Great Britain. House of Lords.

Sd.

THE

JURISDICTION

OF THE

LORDS HOUSE,

OR

PARLIAMENT,

CONSIDERED ACCORDING TO ANTIENT RECORDS.

BY LORD CHIEF JUSTICE HALE.

TO WHICH IS PREFIXED, BY THE EDITOR,
FRANCIS HARGRAVE, ESQ.

AN

INTRODUCTORY PREFACE,

INCLUDING

A NARRATIVE OF THE SAME JURISDICTION FROM THE ACCESSION OF JAMES THE FIRST.

LONDON:

PRINTED FOR T. CADELL, JUN. AND W. DAVIES,
(SUCCESSORS TO MR. CADELL,) IN THE STRAND.

1796.

ERRATA.

I. IN THE PREFACE.

Page iv. line 12. dele *and out of.*
line 17. for *his* insert *the.*
ix. fourth line from the bottom of the page, for *fourth* insert *second.*
xiii. line 20. for *fourth* insert *third.*
xxix. last line, dele *for and.*
xxx. line 2. for *the* insert *that,* and dele *of lords.*
xxxi. last line but one of the note, insert *or* before *of.*
lxx. line 2. of note, dele *and contemptible,* and in line 3. of note, dele *the.*
lxxiii. line 12. for *consolidated* insert *grafted.*
clxiii. last line but one of the text, after *Scroggs* insert *or* for *and.*
clxxxi. fourth line of the text, for the *comma* after commons insert a *colon.*
seventh line from the bottom of the note, after *hemisphere,* insert a *comma* for the *semicolon,* and dele *have.*
cbxxxvii. last line before the note, for *to* insert *of.*
cxciii. line 17. of the note, dele *comma* after *sic* and the *comma* after *perit.*
Throughout the Preface, where *charta* occurs, insert for it *carta.*

II. IN LORD HALE's TREATISE.

Page 12. line 6 from the bottom, for 1. insert 3.
13. line 4. after *judges* add *and.*
26. line 18. for 9. insert 10.
29. line 8. for *roy* insert *loy,* and for *requieſt* insert *requiert.*
line 11. for *ley* insert *loy.*
line 12. for *tien* insert *tieu.*
76. line 32. for *nien* insert *rien.*
106. line 18. after *diſmiſs* insert *ſuch.*
130. two last lines, for *Howerdine's* insert *Flourdew's.*

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PREFACE.

FOR the original manuſcript of the following Treatiſe by lord chief juſtice Hale, on the juriſdiction of the houſe of lords or parliament, the editor is indebted to the very obliging communication of a moſt reſpectable gentleman (*a*); who is the preſent poſſeſſor of the chief juſtice's paternal ſeat and eſtate at Adderley, in Glouceſterſhire; and whoſe lady not only is deſcended from, but is ſole heir at law to, the chief juſtice. Nor is this the ſingle favour, which has been conferred upon the editor by this gentleman: for through his indulgence the editor has long been in the poſſeſſion and uſe, of two other original manuſcripts by lord chief juſtice Hale having relation to the ſame ſubject, and of his lordſhip's original manuſcript collections concerning the rights and prerogatives of the king of England. What alſo greatly enhances the obligation of the editor in theſe reſpects is, that, beſides gratuitouſly permitting the publication of the following Treatiſe, the ſame liberal ſpirit has authorized the editor to publiſh ſuch of the original manu-

(*a*) John Blagden Hale, eſquire, late high ſheriff for the county of Glouceſter.

ſcripts before mentioned, as a very learned judge, with whom the editor has the honour of being acquainted, ſhall concur in thinking not unfit for the public eye. Having been thus conditionally furniſhed with one part of lord Hale's unpubliſhed law-writings, and being the unqualified poſſeſſor of other parts, the editor ſometimes indulges himſelf in a hope, that he may finally be able to preſent the public with a complete edition of lord Hale's learned and impartial collection on the law of England; except his common place book, which, under his laſt will, is the property of the Society of Lincoln's Inn; and alſo except ſuch very unfiniſhed pieces as cannot be publiſhed conſiſtently, either with juſtice to his fame, or with propriety towards the public.

It is a long time ſince this Treatiſe was printed. Some preface was certainly proper; and it was the wiſh of the editor to write one, as ſuitable to the importance of the Treatiſe as his feeble powers would allow. But hitherto he has been prevented from performing this taſk, ſometimes by profeſſional avocations, ſometimes by the preſſure of domeſtic cares and anxieties, ſometimes by broken or languid ſpirits, and not unfrequently by diſtruſt of himſelf. At length, however, he feels ſuch an averſeneſs to further poſtponing a publication of the Treatiſe, and ſuch other reaſons occur againſt all further poſtponement, that he can no longer avoid attempting a preface of ſome kind. Accordingly he will now make an effort to introduce his readers to the following Treatiſe, and to the progreſs of that judicature which is its chief ſubject; not indeed under the expectation of acquitting himſelf in any manner adequate to ſo high, complicated, and delicate a topic, as the right

right to the ſupreme juriſdiction of the kingdom; but yet with a hope, that even his humble endeavours may throw ſome light and be of ſome ſmall uſe; and with a reliance, that he ſhall experience a ſhare of that lenity of criticiſm, which liberal minds rarely deny to thoſe, who, conſcious of great inferiority and imperfection, ſolicit indulgence.

LORD HALE's Treatiſe, now publiſhed, having immediate relation to the controverſy heretofore exiſting between the lords and commons, about the judicature of parliament, more eſpecially on *petitions to the lords*, it may be uſeful, in the firſt place, to attempt ſome account of the origin and progreſs of that controverſy.—In the next place it will naturally occur to explain to the readers, how far the writings of lord Hale, particularly the Treatiſe now publiſhed, apply to that ſubject; what ſhare he took in the controverſy; what is the general tendency of his opinions; and how far thoſe opinions have, or have not, prevailed; and alſo how far any point of his doctrine ſtill remains to be decided upon.

BEFORE entering upon an account of the controverſy, between the two houſes of the Engliſh parliament, about judicature, it may be fit to explain the limits, within which the editor, for the moſt part, and as far as the complex nature of that controverſy will permit, means to confine himſelf.

THERE are various kinds of judicature exerciſable in parliament.—The lords have a judicature for their privileges; and

ſince the union have had a judicature for controverted elections of the ſixteen peers for Scotland.—The commons have a judicature for the privileges of their houſe, and alſo for determining matters relative to the election of their members.—There is a judicature for impeachment: and under it, on the one hand, the commons, as the great repreſentative inqueſt of the nation, firſt find the crime, and afterwards, acting as proſecutors, endeavour to ſupport their finding before the lords; whilſt, on the other hand, the lords exerciſe the function both of judge and jury, in trial of the cauſe and in deciding upon it.—Further, there is a judicature for the trials of peers, by the lords, in and out of parliament.—There is alſo a kind of judicature exerciſed by the lords in parliament, over claims of peerage and offices of honour, under references from the crown.

But the narrative, the editor means to offer, is not with a particular view to theſe ſeveral kinds of judicature; for his object is chiefly applicable and reſtricted to the controverſy between the two houſes of parliament,—about the exerciſe of an *original* juriſdiction by the lords in *civil* cauſes,—about the exerciſe of an *appellant* juriſdiction by the lords in cauſes of *equity*, on a petition to themſelves, and not as upon a writ of error, but without commiſſion or delegation of any kind from the crown,—about the claim to extend ſuch original and appellant juriſdiction to all cauſes, whether temporal or eccleſiaſtical, maritime or military, which the lords ſhall pleaſe to undertake,—about the claim to a juriſdiction thus vaſt and comprehenſive, under the ſuppoſition of a *primitive* and *inherent* right in the lords, attached to their order by the law and conſtitution of the kingdom,—

kingdom,—and about the exerciſe of ſuch original and appellant juriſdiction by the lords ſingly, as being in themſelves, without any participation either of the king or the houſe of commons, the ſupreme and *dernier* reſort.

SUCH is the nature of the controverſy, to which lord Hale's following Treatiſe chiefly applies, and of which therefore it is now intended to give a general account.

THIS great controverſy, about original and appellant judicature in parliament, did not regularly begin till ſome few years after the reſtoration. But ſeveral things, which connect with and may illuſtrate the ſubject, and ſome of which were not wholly unmixed with controverſy, occurred previouſly; and in reſpect of them it may be convenient to go back as far as the acceſſion of James the Firſt to the crown of England, and in ſome degree to look back even to a ſtill earlier time.

FOR about a century and a half before the acceſſion of James, there appears to have been little or no judicial buſineſs tranſacted in parliament, either on original cauſes or in the way of appeal. The printed rolls of parliament begin with the ſixth of Edward the Firſt. From thence to the end of the reign of the fourth Henry, thoſe rolls record a great variety of judicial matters, civil as well as criminal. In the more early part of that period, there is a regular entry of *placita parliamentaria*; and ſo great is the quantity of matter, that Mr. Ryley's printed book of pleadings in parliament, from an antient manuſcript book of collections, in the Tower, makes a large volume, though he finiſhes with the fourteenth

of

of Edward the Second; the collections in his appendix, ſome part of which is of a later date, being miſcellaneous matter of another kind. Throughout the ſame period, the rolls of parliament, beſides having occaſionally ſuch pleadings, are full of petitions and writs of error and of other proceedings of a judicial nature. But after the reign of Henry the Fourth, though the old form of the king's appointing receivers and tryers or auditors of petitions at the beginning of every parliament, which is traceable as far back as the thirty-third of Edward the Firſt (*b*), and is ſtill ſcrupulouſly adhered to, was continued, and ſo ever gave the opportunity of calling the judicature of parliament into action; yet, in point of fact, the exerciſe of juriſdiction in parliament over cauſes, ſeems to have gradually fallen into much diſuſe. In the following Treatiſe it is obſervable, that lord Hale, in his chapter (*c*) on the inſtances of writs and petitions of error, from the beginning of Edward the Third till the firſt of Henry the Seventh, concludes with a petition of error in the tenth of Henry the Sixth; which at firſt ſtruck the editor as a want of finiſh to the chapter, and cauſed a note (*d*) hinting as much; but which he now inclines to impute, if not to a total want, yet at leaſt to a paucity, of ſubſequent caſes, or to an extreme difficulty of tracing them. It is obſervable alſo, that the report of the lords committees in 1791 on a late and memorable impeachment, though ſo very laborious an inveſtigation was made upon the occaſion, ſcarce ſupplies any matter concerning the judicature of parliament between the acceſſion of Henry the

(*b*) Rot. Parl. 33. E. 1. No. 1.
(*c*) Chap. XXX.
(*d*) See the note at the end of Chap. XXX.

Fifth

Fifth and that of James the Firſt (*e*); the only criminal cauſes, in parliament mentioned in that long interval, being the lady Abergavenny's caſe in the 10. and 11. Hen. 6. and the duke of Suffolk's caſe on impeachment by the commons in the twenty-eighth of the ſame reign; and the only civil cauſes being Gunwardby's caſe in 1. Hen. 5. Catermain's in the fifth of the ſame reign, an order made by the lords 25. Feb. 23. Eliz. for a *ſcire facias* on a writ of error in a caſe not named, and a reference by the lords to the judges on a writ of error between Akerode and Walley in 27. Eliz. with a ſubſequent order for abating the writ in conſequence of their report (*f*). Nor do the journals of the two houſes ſupply anything further of conſequence towards filling up this great chaſm. In the journals of the lords, the only other matter conſiſts, of a memorandum in the twenty-ſeventh of Elizabeth as to the bringing in of the record by the chief juſtice of the king's bench, concerning a writ of error *according to a bill preferred to the queen and ſigned with her hand for the ſame* (*g*); of aſſignment of errors and reverſal of judgment of the lords PER CONSILIUM JUSTICIARIORUM in the ſame caſe; and of the bringing in, by the chief juſtice of the king's bench in the thirty-firſt of Elizabeth, of another writ of error, with *the bill of the queen indorſed* and the record in which the error was ſuppoſed (*h*). In the journals of the

(*e*) See page 91 and 92 of the Report of the Lords Committees on the State of the Impeachment againſt Mr. Haſtings.

(*f*) Journ. Dom. Proc. 15. Feb. and 11. Mar. 27. Eliz. and ſee S. C. in Dy. 375.

(*g*) Journ. Dom. Proc. 4. & 8. Mar. 27. Eliz.

(*h*) Journ. Dom. Proc. 24. Mar. 31. Eliz.

commons

commons there is not anything in the leaſt applicable. We muſt not, however, abſolutely conclude, that there was not any other exerciſe of judicature in parliament between the third of Henry the Fifth and the reign of James the Firſt than what thus appears; for there is great reaſon to believe both the exiſting rolls of parliament and the early journals of both houſes very incomplete; and it is not improbable, but that Flourdew's caſe of error in parliament, which is in the Year-book of 1. Hen. 7. fol. 19. b. & 20. and which lord Hale (*i*) conjectures to be the very ſame caſe as that in Raſtall's entries title "Writ of Error in Parliament," may be one inſtance of the imperfection. All, therefore, which perhaps can be properly aſſerted is, that from the third of Henry the Fifth to the acceſſion of James the Firſt, there appears to have been little exerciſe of judicature in parliament civilly or indeed criminally; unleſs the cruel precedents of acts of attainder without hearing the accuſed, and the indulgent precedents of acts of reſtitution without aſſignment of errors, of both of which the number is great, are fit to be conſidered as judicial records.

EVEN after the acceſſion of James the Firſt there is for many years a dearth of judicial proceedings in parliament; the firſt ſixteen or ſeventeen years of his reign, in which time two parliaments, one of ſeven years and the other of one year, were holden, not furniſhing any cauſes civil or criminal; except caſes of privilege; and except that there is a reported caſe (*k*) of the eleventh and twelfth of James, in

(*i*) See page 130 of the following Treatiſe.

(*k*) Heydon *v.* Godſole and others, in 2. Bulſtr. 159. and other books.

which

which a writ of error in parliament appears to have been ſued out on a judgment of the king's bench, though there is not any mention of its being brought to a hearing.

But James's third parliament, which met in January 1620-1, and continued till February 1621-2, was much occupied with the exerciſe of criminal judicature; and ſome things occurred material in the conſideration of the appellant juriſdiction. The king had, in June 1614, diſſolved his ſecond parliament in great paſſion: and immediately afterwards had impriſoned ſome of the moſt active members of the commons for their parliamentary conduct (*l*). One of the chief

(*l*) This fact is mentioned in Wilſon's Life and Reign of James the Firſt. But it is doubted in the Parliamentary Hiſtory. (See Vol. v. p. 305.) However it is conceived that there is not any ſufficient reaſon for the doubt. The fact is related with great particularity in a curious manuſcript, intitled *Liber Familiæus*, by that eminent judge Sir James Whitelocke, who was father of the famous Sir Bulſtrode Whitelocke, and was member of the houſe of commons in James's third parliament, and was himſelf ſummoned to the council board for his zeal againſt impoſitions at the ports without the conſent of parliament. This curious manuſcript now belongs to the judge's deſcendant lieutenant-colonel Whitelocke, and through his favour and that of his brother-in-law Matthew Lewis, eſq. the preſent under ſecretary at war, the writer of this preface has been long indulged with the uſe of it. Though the book was profeſſedly intended for memorials of himſelf and family, yet the writer often extends beyond that line, and introduces anecdotes and facts, very illuſtrative of the hiſtory of James the Firſt and of the characters of the ſtateſmen and great lawyers in that reign. The diſſolution of king James's fourth parliament is thus deſcribed in this valuable manuſcript.

"On Tueſday the 7th of June 1614 the parliament was diſſolved, in that "manner that all good people were very ſorry for it. I think it not fit

to

reaſons of the diſſolution ſeems to have been, that the commons were very ſlow in granting ſupplies, but very eager to inveſtigate and redreſs grievances, particularly the grievance of impoſitions.

" to play the part of a hiſtoriographer about it; but I pray God we never ſee " the like. On Wedneſday following, in the morning, myſelf, Mr. Thomas " Crew, and others, that were aſſigned by the houſe of commons to be agents in " the conference deſired by the commons with the lords concerning impoſitions, " were called to the council table at Whitehall, where having every one deli- " vered what part he was aſſigned unto, we were all commanded to burn the " notes, arguments, and collections, we had made for the preparing ourſelves " to the conference. I brought mine to the clerk of the council Mr. Cotting- " ham, the ſame afternoon, being twenty-four ſides in folio written with my own " hand, and ſaw them burnt.

" The parts were thus aſſigned.—Sir Henry Mountagu, recorder of " London and the king's ſerjeant, was appointed to ſhew the cauſes, why " we deſired this conference. This ſhould have been by itſelf, and the " conference at another time after.—Sir Francis Bacon was to have made the " introduction to the buſineſs, and ſo ſet the ſtate of the queſtion.—Sir Edward " Sandys was to ſhew, that the king's impoſing, without aſſent of Parlia- " ment, was contrary to the natural frame and conſtitution of the policy of the " kingdom, as that it was a right of majeſty and ſovereign power, which the " kings of England could not exerciſe but in parliament; as that of law-mak- " ing, naturalizing, *ultima provocatio*, and the like.—Mr. Thomas Crew was to " ſhew the reaſon and judgment of the common law of the land, that which is " *inter privatum et contentioſum*, to be the ſame.—I was appointed to ſhew the " practice of the ſtate in the very point, as being the beſt evidence to ſhew whe- " ther it were a ſovereignty belonging to the king in parliament or out of parlia- " ment, and to me were aſſigned the reigns of *E.* 1. *E.* 2. and *E.* 3. the heat of " all the buſineſs.—The time from 50. *E.* 3. to 3. and 4. Philip and Mary, " during which time there was not an impoſition ſet on but by aſſent of par- " liament, was aſſigned to Thomas Wentworth, of Lincoln's Inn, and to John " Hoſkins, of the Middle Temple.—The time from 3. and 4. Philip and Mary " to this preſent was aſſigned to Nicholas Hyde, of the Inner Temple.—There " were appointed to anſwer objections Mr. Jones, Mr. Chibborn, and Mr. " Hakewell,

impoſitions by the king at the ports; for though at his acceſſion he accepted a parliamentary grant of duties on exported and

" Hakewell, of Lincoln's Inn.—Sir Roger Owen was appointed to ſhew, that " no foreign ſtate could or did ſet on as the kings of England did.—Sir Dudley " Diggs was appointed to open the matter of inconvenience to the common " profit of the kingdom.---Sir Samuel Sandys was to conclude the buſineſs.

" The ſame 8th of June, after we had been with the lords, there were ſent to " the Tower four parliament men; Sir Walter Chute, Mr. Chriſtopher Nevil " younger ſon to Lord Abergavenny, Mr. Wentworth, and Mr. Hoſkins. All " the while the Lords ſat, the king was in the clerk of the council's chamber. I " ſaw him look through an open place in the hangings, about the bigneſs of the " palm of one's hand, all the while the lords were in with us.

" We were all ſent out of the chamber; and then Mr. Wentworth and Mr. " Hoſkins were ſent for back into the chamber, and after ſome ſpeech unto them " by the Lords they were ſent to the Tower.

" Sir John Savil knight for Yorkſhire and Sir Edwyn Sandys were called be- " fore the lords and diſmiſſed upon bonds. So was Sir Edward Gyles, of Devon- " ſhire, and diverſe others, as Sir Roger Owen. There were diverſe put out of " the commiſſion of the peace, as Sir John Savil, Sir Roger Owen, Sir Edward " Philips, Mr. Nicholas Hide, and others.

" There were committed to the Tower ſhortly after the parliament, Sir Charles " Cornwallis and Dr. Sharpe archdeacon of Berks, for conferences laid to their " charge with Mr. Hoſkins about parliament matters.

" Theſe things I would not medle with, but they happened where I was " an agent.

" In September 1614, Sir Edward Philips, maſter of the rolls, died of an ague. " He fell ſick at Wanſtead in Eſſex, and came from thence to the rolls, and there " died: he was my very good friend. It is thought that grief he took at the " king's diſpleaſure towards him for his ſon's roughneſs in the parliament, haſtened " his death: but I cannot think that a man can be ſuch a mope."

imported goods for his life, by a ſtatute (*m*) expreſſly reciting that his predeceſſors had time out of mind enjoyed duties of that kind under authority of parliament, he had not ſcrupled to act as if he was ſingly competent to impoſe ſuch duties; and for more effectually repreſſing this evil, the commons, after being refuſed a conference (*n*) by the lords on the proceedings againſt ſuch impoſitions, were going on rapidly with a bill to condemn ſo taxing the ports under the colour of prerogative (*nn*). Having diſſolved his ſecond parliament in ſo much ill humour,

(*m*) See 1. Jam. c. 33. in vol. ii. of Raſtall's Statutes.

(*n*) Journ. Dom. Proc. 12 May 1614, there is an abbreviated account of the report of the committee for arranging a conference with the lords on impoſitions. It is not in ſome reſpects ſo complete as the ſtatement in judge Whitelocke's *Liber Familicus*, but is well worth conſulting. The declining of the propoſed conference appears in Journ. Comm. 26 May 1614, and Journ. Dom. Proc. for the ſame day. It appears, that the lords had previouſly required the opinions of the judges on the legality of impoſitions by the king, and that they had deſired to be excuſed from anſwering extrajudicially. Journ. Dom. Proc. 23 May 1614.

(*nn*) Impoſitions by the king at the ports had been ſeveral times attacked by the commons in the reign of James as a grievance. More particularly in 1610, the commons, *after an inveſtigation of the public records*, and a ſolemn hearing of arguments, condemned them, and voted a petition of grievances, in which ſuch impoſitions were made the firſt article of complaint; and afterwards, in the ſame year, the commons had paſſed a bill againſt them. See Journ. Comm. 11 Apr. and 10 May 1606. 19 Nov. 1606. 3, 4. 10. 12. and 17. July 1610. But no ſtatute expreſſly and by name declaring ſuch impoſitions illegal was paſſed till 1640. See 11. State Tri. 29. What great induſtry was uſed in the ſearch of records during the pendency of the queſtion on impoſitions by the king at the ports before the commons in 1610 and 1614, ſtrikingly appears from a curious manuſcript volume, which now belongs to the writer of this preface, but formerly belonged to Sir Nicholas Hyde, who in 1614 was one of the members appointed by the commons to manage the intended conference with the lords on impoſitions,

humour, James ſtrove to carry on his government without any parliament. Accordingly ſix years paſſed without the legiſlature ſummoned. But during that interval there accumulated a great addition to the grievances before complained of. More eſpecially it appears that the grievance of monopoly and other oppreſſive patents had ariſen to a vaſt height; and that groſs corruption had even found its way into one of the great courts of Weſtminſter hall. In ſuch a ſituation of things it was not very deſirable to the king or his miniſters to aſſemble parliament. But the king's wants could no longer be adequately ſupplied through the medium either of direct illegal taxation by impoſitions, or of indirect levies by benevolences, forced loans, and the various devices of monopoly and other patents of the irregular kind; and from the loſs of great part of his hereditary dominions to the king's ſon-in-law, the elector palatine, and from the abſolute neceſſity of adminiſtering ſome kind of relief to the affairs of the palatinate, there was an immediate urgency for parliamentary ſupplies. Thus preſſed by his own neceſſities and thoſe of his ſon-in-law, James aſſembled his fourth parliament. But under ſuch circumſtances he could not well avoid, in ſome degree, anticipating the ſeverities which were likely to be inflicted on ſome at leaſt of thoſe deeply concerned in

impoſitions, but in the ſecond of Charles the First was made chief juſtice of the king's bench. The chief article in the volume is a collection of records concerning impoſitions, beginning 16. Hen. 3. and ending 1. Eliz. It probably was a copy of the very collection made for the uſe of the houſe of commons at the time of the diſcuſſion. The volume contains many other valuable collections of the parliamentary and legal kind, ſome of which are underſtood to be in Sir Nicholas Hyde's own hand writing.

the.

the current oppreſſions and corruptions. Accordingly his opening ſpeech to the parliament (*o*) not only ſtated the main cauſe of his wants to be the ill government of ſome he had truſted (*oo*), but hinted at the poſſibility of ſomething amiſs even amongſt thoſe he had choſen to adminiſter juſtice.

THE reſult was an immediate inveſtigation by the commons: and thus the criminal judicature of parliament, ſo long dormant, was recalled into activity; as appears more particularly, by the ſeveral proceedings, againſt lord chancellor Bacon and ſir John Bennet judge of the prerogative court, for judicial corruptions; againſt Field, biſhop of Llandaff, for brocage in bribing lord Bacon; and againſt ſir Giles Mompeſſon, ſir Francis Michell, and others, for oppreſſions under patents of various deſcriptions; and alſo againſt ſir Henry Yelverton, for miſconduct in the office of attorney general.

BUT upon theſe criminal proſecutions, in the third parliament of the firſt James, there was nothing of controverſy about judicature between the two houſes; for except in ſir Henry Yelverton's caſe (which from beginning to end was a jumble of proſecutions; and having been firſt carried on in the ſtar-chamber and then in the houſe of lords, and there beginning for miſdemeanor of office, and after ſentence for other offences under colour of privilege, ending in compromiſes, thus becomes ſo complicated and irregular, as to be almoſt

(*o*) 5. Parl. Hiſt. 311.

(*oo*) This ſeems to have been, in ſome degree, aimed at James's diſgraced favourite Carr earl of Somerſet. As to the ſucceeding favourite Villiers, marquis of Buckingham, he was at this time in high power, and indeed ſo continued till the cataſtrophe of his death in the next reign.

unintelligible)

unintelligible) the commons accuſed and the lords tried and adjudged: and though both houſes acted with the irregularities and informalities to be expected from perſons ſo long out of the habit of ſuch proceedings, yet neither houſe ſeemed to be under difficulty as to the part which belonged to itſelf, where the commons proceeded by impeachments. Therefore little more can be thence collected for the purpoſe of the controverſy, which at a ſubſequent period aroſe about original and appellant juriſdiction, than that ſuch proceedings had the effect of attracting the attention, both of the lords and commons, to the nature of judicature in parliament; and that the former, finding themſelves confeſſedly the judges on impeachments by the commons, were afterwards more eaſily induced to attribute the judicature of parliament to themſelves in other caſes. It is indeed one thing, on the part of the lords, to adjudge, where the commons are parties as proſecutors and ſo call upon the lords to be the judges, and where numerous antient precedents of the moſt unequivocal kind and the very nature of the proceeding concur to give the judgment to the lords; and it is another thing, on their part, ſo to adjudge, where the commons are not parties or aſſenters in any way, and where the lords become judges by their own act in receiving petitions of appeal, or otherwiſe, from the king's ſubjects, without any the leaſt participation either of the king or the commons, and where perhaps antient precedents may be wanting. But it belongs to the infirmity of human nature to love power; and therefore it is not very wonderful, that ſuch a diſcrimination between juriſdiction on impeachment, and juriſdiction on petitions of appeal or private petitions of any kind, ſhould not be anxiouſly explored by thoſe whoſe judicature it tended to limit.

ONE

ONE criminal cafe however, not yet adverted to, did occur in this parliament of James, with circumſtances and a reſult peculiarly calculated to inſpire the lords with high notions of their judicative power. The outline of the caſe is to this effect.—Mr. Edward Floyd (*p*), a Roman catholic barriſter, and a priſoner in the Fleet, had uttered ſome indecent and ſpiteful expreſſions againſt king James's only ſurviving daughter and her huſband the elector palatine, both of whom had taken refuge in England and were extremely popular. The commons, in the rage of zeal for proteſtantiſm, haſtily took cognizance of the matter, though clearly not a caſe of privilege; and, as their cuſtom is, examined witneſſes without oath, and having heard Floyd in his defence, ſentenced him to a very harſh and infamous puniſhment (*q*). At this aſſumption of criminal juriſdiction by the commons, in a caſe clearly foreign to their privileges, both the king and lords immediately beſtirred themſelves. The very day after the ſentence (*r*), the king, by his chancellor of the exchequer, queſtioned the power of the houſe of commons to examine and puniſh offences; and ſent to the

(*p*) Concerning Floyd's caſe, ſee the two volumes of Proceed. and Deb. of Comm. in 1620 and 1621, the 5th vol. of Parl. Hiſt. and the Journals of the Commons for April and May 1621, and the Journals of the Lords for May in the ſame year.

(*q*) The puniſhment was pillory twice, with the additional degradation of Floyd's riding backward on a horſe and having the horſe's tail in his hand, and with a fine of 1000l. Journ. Comm. 2d May 1621. For the form of the judgment at length ſee Journ. Comm. 4th May in the ſame year.

(*r*) 3d May, 1621.

commons

commons the roll of parliament of the 1. Hen. 4. (*s*); by which the then houſe of commons themſelves are ſtated to have repreſented the judgments of the parliament to belong only to the king and the lords; and upon which the aſſerters of both the original and appellant juriſdiction for the lords have ever ſince laid a peculiar ſtreſs. Almoſt immediately after this (*t*), the lords, noticing what had been done by the commons againſt Floyd, and their entering their judgment as an act with themſelves, and that this trenched deep into the privileges of the lords, becauſe, as their journal expreſſes it, all judgments do properly and only belong unto them, reſolved not to ſuffer anything to paſs, which might prejudice their right in point of judicature; and ſent a meſſage to the commons with propoſal of conference to accommodate the buſineſs. Upon having the regularity of their proceeding thus doubly aſſailed, the commons were apparently under a difficulty; and it is curious to read, in their printed journal, the ſhort notes of the palliating arguments, which immediately came from the great lawyers and other leading members, both on receipt of the king's meſſage and of that of the lords. Sir Edward Coke (who it appears however was not preſent when the commons ſentenced Floyd) and other eminent members, were indeed too ſharp ſighted to be blind, either to the obſervations to which the parliament roll of Henry the Fourth was open, or to the inconſiſtency of its language, in attributing judgment to *the king and lords jointly*, with the language of the lords in attributing judgment to

(*s*) Rot. Parl. 1. Hen. 4. n. 79.
(*t*) Journ. Dom. Proc. 5th May 1621.

themſelves only. But however poſſible it might be to ſhew their right of being parties in ſome way or other to the judgments of parliament, and whatever might be the weight of antient precedents againſt the excluſion of the commons in this reſpect, it was too arduous to undertake ſhewing, that the houſe of commons ſingly had complete juriſdiction over an offence unconnected with their privileges; and without going that length, it was impoſſible to juſtify their judgment againſt Floyd. Above too, in this inſtance, the littleneſs of perſevering in groſs error, they, after ſome heſitation (*u*), adopted an expedient well calculated to ſecure a retreat from their precipitate encroachment, without the leaſt ſacrifice of their real rights and powers: for at length the commons, on the one hand, conceded, that out of their zeal they had ſentenced Floyd, and that they would leave him to the lords; but, on the other hand, guarded againſt inferring too much, by a proteſtation, that their proceedings againſt Floyd ſhould not be uſed "as a precedent "to the enlarging or diminiſhing the lawful rights and privi- "leges of either houſe, but that the rights and privileges of "both houſes ſhould remain in the ſelf ſame ſtate and plight "as before (*w*)." Upon theſe terms the difference between the houſe of commons, with the king and the lords, was accordingly cloſed. Afterwards Floyd was charged by the attorney general before the lords; and the very ſame day the caſe terminated with their formal ſentence of puniſhment againſt him; but this was ſo cruelly exceſſive, and ſo coarſely ignominious, as to be a ſtain to the time in which it was

(*u*) Journ. Comm. 3, 4, 5. 7, 8. 11, 12 May 1621.

(*w*) Journ. Dom. Proc. 12 May 1621; and Journ. Comm. of ſame date, and 14 May following.

pronounced.

pronounced. Not content with the harſhneſs, with which the ſentence of the commons was ſo replete, the lords ſubſtituted one, inflicting, not only a diſguſting aggregate of ignominy, diſability, corporal puniſhment, and pecuniary mulct, but a palpable exceſs of each (*x*). Thus the firſt fruits of victory by the lords, over an encroachment of the commons, were ſuch an intemperate uſe of judicial power, as tended to bring both houſes into vaſt diſrepute. Thus, alſo, out of the relinquiſhment of an unconſtitutional aſſumption of power by the commons, there ſeems to have grown an aſſumption, ſomewhat ſimilar, by the lords; unleſs indeed what paſſed in the commons is to be deemed equivalent to an impeachment: for, as on the one hand, the commons have not a judicative power over miſdemeanors, not being within privilege, and not proceeded againſt by bill; ſo, on the other hand, impeachment, or ſomething tantamount, of the commons, muſt, it is preſumed, be conſidered as eſſential to found the judicature of the lords in ſuch caſes. However, when we look to this very exceptionable proceeding, we ought to recollect the boiſterous rage of the time againſt Roman catholics, and the prevailing zeal for the electreſs palatine and her huſband, as victims in the cauſe of proteſtantiſm; and thence it may be ſuppoſed, that

(*x*) The ſubſtance of the ſentence was, 1. That he ſhould be incapable of bearing arms as a gentleman, and be held an infamous perſon, and his teſtimony not taken in any court or cauſe: 2. That he ſhould be pilloried, with the addition of being carried on horſeback with his face to the horſe's tail and with the tail in his hand, and papers on his head and breaſt declaring his offence; and with the addition of being branded with a K in his forehead: 3. That he ſhould be pilloried a ſecond time, with the addition of whipping at the cart's-tail: 4. That he ſhould be fined 5000l. to the king: 5. That he ſhould be impriſoned in Newgate during his life. Journ. Dom. Proc. 26 May 1621.

the exceſs, into which the lords were precipitated, was partly a ſacrifice to the popular ſpirit of the moment. It is alſo a juſtice due to the lords to add, that they ſeem to have almoſt immediately repented of going ſuch lengths againſt Floyd in point of puniſhment, and to have felt a conſciouſneſs of precipitancy: for four days after the ſentence, they not only ſuſpended the whipping part and all belonging to it; but made an order to prevent in future giving immediate judgment in caſe of cenſure beyond impriſonment, and for that purpoſe directed poſtponement till another day's ſitting for conſideration (y). Nor, even upon the worſt view of this caſe of Floyd, ought we to ſuffer our minds to be carried into prejudice againſt the conſtitutional power of the houſe of lords. Should abuſe of political power, by the poſſeſſors for the time, be taken for proof of its not being entruſted, or as a reaſon for changing the ſtructure of government; in the one caſe there cannot be ſuch a thing as conſtitutional power, and in the other no conſtitution can be permanent: becauſe it is not poſſible ever ſo to frame any government, as wholly to exempt political power from abuſe in the exerciſe. This length of ſtatement and obſervation, in reſpect to a caſe merely of exerciſe of original juriſdiction in parliament over miſdemeanors, may perhaps appear too great for the preſent purpoſe, which has chiefly in view the controverſy between the two houſes about appellant and other juriſdiction upon petition to the lords. But the caſe of Mr. Floyd is ſometimes looked up to, as if it was deciſive of the general point of judicature againſt the commons and in favour of the lords; and as if by it the commons had renounced all pretenſion to any ſhare of the judicature of par-

(y) Journ. Dom. Proc. 30 May 1621.

liament

liament beyond the power of impeaching and vindication of their own privileges (z). Therefore it becomes material to know enough of the caſe of Floyd to aſcertain, what was the nature of the retraction of the commons; and how far it can be juſtly applied to affect their judicial pretenſions: and this it is hoped will be accepted as a ſufficient apology for ſo long dwelling upon a ſingle caſe (a).

IN

(z) 5. Parl. Hiſt. 435.

(a) In the Appendix to the two volumes of Proceed. and Deb. of Comm. in 1620 and 1621, there is a reference to No. 6274 of the Harleian MSS. as containing a collection of the proceedings in Floyd's caſe by Sir Harbottle Grimſtone; and it is there ſtated, that Mr. Harley, afterwards Earl of Oxford and Lord Treaſurer, has written, in the firſt page of the manuſcripts, the two following cenſures.

"AT THE TOP OF THE TITLE.

"The following collection is an inſtance, how far a zeal againſt popery, and for "one branch of the royal family, which was ſuppoſed to be neglected by king "James, and conſequently in oppoſition to him, will carry people againſt juſtice "and common humanity. R. H. July 14, 1704."

"AT THE BOTTOM.

"For the honour of Engliſhmen, and indeed of human nature, it were to be "hoped, theſe debates were not truly taken; there being ſo many motions con-"trary to the laws of the land, the laws of parliament and public juſtice.

"July 14, 1702. RO. HARLEY."

Lord Treaſurer Oxford was eminent for his parliamentary knowledge. Such a cenſure from him, therefore, tells with peculiar ſtrength.

But however open to animadverſion the judicative proceedings in the parliament of the eighteenth of James may have ſince appeared, thoſe, from whom the judgments of puniſhment came, did not act, as if they wiſhed to extinguiſh the remembrance of any part. On the contrary we find, that a roll of the ſeveral criminal judgments paſſed in this parliament was framed with great particularity;

and

In reſpect to civil judicature during James's fourth parliament, there occurs one caſe, in which the lords appear without ſcruple to have exerciſed an *original* juriſdiction independent both of the king and the commons: for, on the petition of a Mr. Cunningham, complaining of the detainer from him by the Muſcovy company of a debt of ſeveral hundred pounds, the lords took cognizance of the matter, and made an order, as if they were competent to adminiſter civil juſtice in the firſt inſtance: and there are two or three other caſes, in which the lords not only were petitioned, but made orders like perſons poſſeſſing ſuch an original juriſdiction (*b*).—But the chief civil caſe, deſerving attention, is the proceeding upon the petition of Sir John Bourchier knight, againſt certain

and it is now to be ſeen amongſt the records in the Rolls Chapel. The title of this record is, *Rotulus Judiciorum redditorum in Parliamento tent. apud Weſtm. triceſimo Die Januarii Anno decimo octavo Regni Regis Jacobi.* The roll is very long, explaining both the nature of the charges and the ſubſtance of the evidence with fulneſs. It contains the ſeveral caſes of Sir Giles Mompeſſon, Sir Francis Michell, Lord chancellor Bacon, Dr. Field biſhop of Landaff, and Mr. Floyd. Againſt each of the three former, there is a judgment by the lords on attendance of the commons and demand of judgment by their ſpeaker. Againſt biſhop Field, the ſentence of the lords was a mere reference of him to the archbiſhop of Canterbury for admonition before the biſhops and clergy in convocation. The judgment againſt Floyd recites the proteſtation of the commons for ſaving their rights and privileges. The roll concludes with the ſentence in Floyd's caſe, and is ſubſcribed by H. Elſynge as clerk in parliament. This roll, conſidered as an illuſtration of the parliamentary hiſtory of the time, deſerves to be publiſhed. In the title to the printed ſtatutes of 18. Jam. it is erroneouſly referred to as a private act of parliament. For inſpection of this curious roll the writer of this preface is indebted to the gratuitous politeneſs of John Kipling Eſquire clerk of the records in the Rolls chapel.

(*b*) See the caſe of Lord Morley's tenants and the caſe of Sir John Bennett junior. Journ. Dom. Proc. 1. June 1621.

orders

orders made by the Lord keeper Williams in croſs ſuits between (*bb*) Sir John Bourchier and John Mompeſſon and others. The petition was preſented by Lord Sheffield. It ſtated the ſuits to be about a leaſe for years. It alledged, that the hearing was appointed for the fifth of November; that the lord keeper, haſtening the firſt of the orders by reaſon of the day, made the ſame greatly to Sir John's prejudice; that he had petitioned the lord keeper for a further hearing to have the reading of proofs, which the ſhortneſs of the time and ſuddenneſs of the order had prevented; and that the lord keeper denied a further hearing, but *allowed an appeal to the lords.* After ſtating a conſequential order made againſt Sir John to pay a ſum of money, and complaining of that alſo, the petition concluded with expreſs words of *appeal to the lords*, deſiring, that they would, as *well for juſtice ſake and for the future good of others as the petitioner's relief*, be pleaſed to hear and adjudge the caſe. Upon reading of this petition the lord keeper declared the reaſons of his decree, and denied the alledged precipitancy, and moved the lords to conſider whether the petition ſhould be admitted. The lords immediately went into a committee for the ſake of more free diſcuſſion: and the houſe being reſumed an order was made, that the lords committees for privileges ſhould conſider, whether the petition was "a "formal appeal for matter of juſtice or no;" and that the judges ſhould attend: and on a ſubſequent day Sir John was alſo ordered to attend a committee. A week after this reference the archbiſhop of Canterbury, who was the firſt of the committee, reported to the houſe "that diverſe lords of their ſub-

(*bb*) Journ. Dom. Proc. 3. 6. 10. 11. & 12. Dec. 1621.

"committee,

"committee, appointed to ſearch for precedents, cannot find, "that the word *appeal* is uſual in any petition for any matter "to be brought in hither. But they find, that all matters "complained of here were by petitions only, *the antient* "*accuſtomed form thereof being to the king and his great coun-* "*cil*; and that they cannot find but only one precedent of "this nature, which was a complaint by petition againſt "Michael de la Pole lord chancellor for *matter of corrup-* "*tion* (*c*)." The lords in a committee then examined Sir John Bourchier

(*c*) The record of the caſe is at length in the Rot. Parl. 7. R. 2. par. 2. n. 11. to 16. The record literally tranſlated from the French begins thus. "One "John Cavendiſhe of London fiſhmonger complains in this parliament, *firſt be-* "*fore the commons of England in their aſſembly* in preſence of ſome prelates "and lords there being, *and afterwards before all the prelates and lords* being in "this parliament." At the commencement of his complaint he prays, that "for "God the lords would make ſure and haſty proviſion for ſafety of his life, and "that he ſhould have ſurety of peace of thoſe of whom he ſhould make his "complaint: and eſpecially he demands ſurety of the peace of Sir Michael De "la Pole chancellor of England; and this requeſt was granted to him. And "upon this, by command of the *lords* aforeſaid, the ſaid Sir Michael then preſent "there found mainpriſe for him and all his to carry good peace towards the ſaid "John, to wit, the Earl of Stafford and the Earl of Saliſbury." After this introduction the complaint of Cavendiſh follows at length. It is not ſo expreſſed, as clearly to ſhew, whether it was meant to be addreſſed to both lords and commons or to the lords only: but it ſeems rather to point at both; for where it refers to thoſe who are to adjudge the matter, the phraſe is "*le juges vous* "MESSRS," which word MESSRS may mean commons as well as the lords.—The complaint was, that Cavendiſhe had ſued in the laſt parliament by a bill againſt Manfield and two others for reſtitution of merchandiſe of great value loſt at ſea by their default, whilſt they had the ſafeguard of the ſea againſt all enemies; that his bill was endorſed in the ſame parliament, and referred to the chancery to diſcuſs and determine the matter according to law and reaſon; that he had converſation and treaty with a clerk and familiar of the chancellor by name John Otere; that Otere had promiſed, for £40. for his lord and £4. for his own uſe,

Bourchier and various other perſons as to the alledged precipitancy of the hearing; and finding the charge, of precipitancy

uſe, he Cavendiſhe ſhould be well and graciouſly aided by Otere's lord and him without any difficulty. It next ſtated, that he Cavendiſhe promiſed to pay accordingly, and gave obligation; that he afterwards delivered to Otere ſturgeon and other fiſh to the value of £9. at the houſe and for the uſe of the chancellor in part payment of the £40. to him, and alſo delivered ſcarlet cloth which coſt about 32s. to Otere, in part of the £4. promiſed to him: but that though he Cavendiſhe had done and promiſed ſo much, yet he found not aid, favor or ſuccour from the chancellor, but had been and ſtill was delayed and could not have juſtice before him notwithſtanding purſuit of the buſineſs from one day to another and from term to term. Next Cavendiſhe by his complaint affirmed on his word, that he had great ſuſpicion; becauſe Otere had ſeveral times told him, that he Otere could have received a greater ſum of Cavendiſhe's adverſaries; and becauſe whenever he went to the houſe of the chancellor, he found his adverſaries there before him. But whether the chancellor ought to be reputed conuſant of the affair thus related, Cavendiſhe ſaid God knew, but they (VOUS MESSRS) would judge. The complaint added, that true it was, that the chancellor had paid him Cavendiſhe for his fiſh, and thereupon broken the obligation: but whether the chancellor had done this from law and conſcience or to avoid ſlander and reproach, he Cavendiſhe would not ſay, but they (VOUS MESSRS) will judge. Cavendiſhe concluded his complaint with ſaying further for certain, that for the ſcarlet cloth he was not yet paid.——The anſwer of the chancellor to this being tranſlated from the French begins thus. "And upon this the ſaid chancellor "firſt *before the prelates and lords* in parliament, *and ſecondly before the lords and* "COMMONS anſwers and ſays, that of this affair and all this matter he is inno-"cent in every degree." What follows conſiſts of two parts. In the firſt he defended himſelf againſt the delay: in the ſecond againſt the corruption: and it muſt be confeſſed, that in both he ſeems to have explained the matter in a very ſatisfactory manner. The proofs alſo, that he was not privy to the tranſactions between Cavendiſhe and Otere, were ſo clear, as to induce Cavendiſhe to diſavow the part of the accuſation relative to the chancellor. In this ſtate of the buſineſs the chancellor prayed the *lords* to have Cavendiſhe arreſted, till he ſhould find bail to attend, what ſhould be adjudged againſt him for the ſlander. This requeſt was granted; and it was commanded by the *lords* that both Cavendiſhe

tancy and not hearing proofs, not ſupported by evidence, the lords all acquitted the lord keeper of it, and agreed to cenſure Sir John Bourchier for the imputation; and on the day

vendiſhe and the chancellor's clerk ſhould be arreſted; and this was done accordingly. But Cavendiſhe was afterwards ſet at large by the mainpriſe of two perſons, who were bound body for body to have him from one day to another before the *lords* or before whatever judges ſhould be aſſigned. Afterwards alſo, becauſe parliament was near its end, and "the *lords* were ſo greatly occupied then about "other great buſineſs of the realm, the affair was committed to the king's juſtices "to hear and determine it finally, as well for our lord the king, as for the parties, "according to the law, *as the lords of parliament might have done, if the complaint had "been treated farther in their preſence and in the ſame parliament.*"——After this there follows the Latin record of the trial and conviction of Cavendiſhe before Commiſſioners of oyer and terminer for defaming the chancellor in the parliament of 7. R. 2. and it is obſervable, that this Latin record ſtates Cavendiſhe to have complained *in parliamento prædicto, videlicet, coram* COMMUNITATE *regni Angliæ congregatâ, et poſtmodum coram* MAGNATIBUS *ejuſdem regni in eodem parliamento.* The charge againſt Cavendiſhe ſeems to have been founded on the ſtatute of 38. E. 3. ch. 9. for puniſhing him, who proves not his ſuggeſtion made to the king; and what appears ſingular, who proſecuted is not mentioned. Cavendiſhe pleaded, that he had not ſaid or offered any thing againſt the chancellor but only againſt his clerk Otere. The judgment convicted Cavendiſhe of the defamation charged, and awarded 1000 marks to the chancellor for his damages, and committed Cavendiſhe till he ſhould pay that ſum and alſo a fine to the king.

The preceding caſe is thus ſtated with particularity, chiefly to enable the learned reader to judge, how far the commons ſhould be conſtrued to have had a ſhare in the hearing of Cavendiſh's accuſation in parliament, and how far the lords acted ſingly; and whether alſo the caſe can in any degree be properly conſidered as a precedent applicable for the *appellant* juriſdiction of the lords over equity, or even for their *ſole* exerciſe of an original judicature in parliament.

See further lord Hale's ſhort notice of this caſe of Cavendiſh, ſo far as relates to his being puniſhed for defamation of the lord chancellor, in p. 97 of the following treatiſe.

following

following the lords ordered, that he ſhould acknowledge his fault and be impriſoned, but on the interceſſion of the lord keeper the impriſonment was remitted; and ſo the buſineſs ended with Sir John's making a ſolemn acknowledgement of his fault in the form preſcribed to him by the houſe. Upon this caſe Lord Hale, in the following treatiſe (*cc*), juſtly obſerves, that the lords examined the allegation of not hearing the proofs, but would not proceed to hear the *merits*, as the petition prayed. It ſhould ſeem therefore, that, in December 1621, notwithſtanding the recent inveſtigation by Mr. Selden and other gentlemen employed by the lords to collect and digeſt the records about judicature in parliament, which ſhall be preſently noticed in a more particular manner, and notwithſtanding the reſearches of a committee of lords aſſiſted by the judges for precedents in the particular caſe of a petition of appeal, there was at leaſt ſeemingly a declining by the houſe of lords to exerciſe appellant juriſdiction over decrees in equity on a mere petition to themſelves. It ſeems alſo, as if the lords then diſcerned the difference between exerciſing a general appellant juriſdiction over ſuits in equity under a claim of an authority inherent to their order, and exerciſing appellant juriſdiction over ſuits at law under the ſanction and delegation of a writ of error iſſued by the crown, and ſo expreſſed as in effect to commiſſionate them for the particular cauſe. That the ſame houſe of lords undertook the latter and derivative ſpecies of appellant juriſdiction without ſcruple, is very plain; for in the journal of the lords for this very parliament of the years 1620 and 1621, there were entries of orders by the lords upon writs of error,

(*cc*) P. 195.

regulating how on ſuch writs records ſhall be brought into the houſe, awarding writs of ſcire facias for hearing errors to be iſſued in the king's name, and appointing errors to be aſſigned (*d*). That the lords, at the very moment they were informed by their own committee of their not finding ſo much as one precedent to warrant the aſſumption of hearing appeals in equity, ſhould not engage in the appellant juriſdiction over equitable ſuits, without writ, commiſſion, indorſement of petition, or delegation of any kind from the crown, and upon the ſuppoſition of not wanting that ſort of ſanction for their adminiſtering appellant juriſdiction over equity, which ever precedes their adminiſtration of appellant juriſdiction over law; but that on the contrary the lords ſhould wait for ſuch an acceſſion of power to the ariſtocratical part of our government till a more favorable ſeaſon; is not very ſurprizing. But though the lords did not at this time deem it prudent to attempt extending their power over appeals from courts of equity; yet by appointing a committee (*e*) to conſider and report upon all petitions, which appointment ſeems to have been the firſt of the kind in the journals of the lords, they in effect encouraged the looking up to themſelves as having an univerſality of power to relieve, and conſequently the idea of its being unneceſſary to reſort to petitions to the king in parliament; and ſo the lords aſſiſted to continue in a dormant ſtate, both the king's receivers and auditors or triers of petitions, and their own actings under

(*d*) Journ. Dom. Proc. 8. 12. 14. 24. 26. May 1621. and 2. June in ſame year.

(*e*) Journ. Dom. Proc. 29. May 1621.

delegations

delegations from the crown by indorſement of petitions.--- In this way therefore, the lords may be ſaid to have laid ſome degree of foundation, for afterwards undertaking even the appellant juriſdiction over equity. However in one inſtance during this laſt parliament of James, the lords almoſt acted as if they conſidered themſelves intitled to appellant juriſdiction upon petitions; for on the 4th of June 1621 they adopted a report of the committee for petitions, with one article of regulation, which provided that *decrees ſhould not be reverſed upon petitions in* PARLIAMENT without hearing counſel on both ſides. But the word PARLIAMENT in this report makes it rather dubious, whether petitions to themſelves were meant; and the order in favor of this report was ſome months before the caſe of Sir John Bourchier, in which, as has been already ſtated, the lords committees reported the novelty of petitions and appeals, and the houſe itſelf declined medling with the merits.

HERE it is time to leave James's third parliament, which was called in November 1620 and diſſolved in February 1621-2. But before proceeding to another parliament it may not be amiſs to take a ſhort notice of ſome printed pieces having relation to the judicature of parliament, which appear to have been written either wholly or principally about this time.---Of theſe the firſt and principal is the very learned Mr. Selden's book intitled "The Privileges of the Baronage "of England." It is a collection chiefly from the rolls of parliament or other public records under heads. It was made by Mr. Selden, or at leaſt by him and ſome aſſiſtants, for and

at

at the expence of the houſe (*f*) of lords; and there is a manuſcript of it, which belongs to the houſe of lords, and is ſtill kept in the office of the clerk in parliament. Near two thirds of the book are mere tranſlations of antient rolls of parliament relative to impeachments; and this is to be accounted for from the accuſations of the commons, which ſeem to have induced the lords to obtain the aſſiſtance of Mr. Selden's labors. Lord Hale in the following treatiſe (*g*) attributes it to this book of Mr. Selden, that the houſe of lords looked into the *placita parliamentaria* of the reign of Edward the Firſt; the conſequence of which reſearch, according to Lord Hale, was their applying to *themſelves* ſingly all that exerciſe of juriſdiction, which he conſiders as having been by a counſel in parliament of which the lords were *only a part*. But the book has very little applicable to appellant juriſdiction in parliament; and that little is confined to writs of error. ---The ſecond printed piece is Mr. Selden's book on "The "Judicature in Parliaments." It was not publiſhed till after his death. In one part (*b*) it comprehends the impeachment of the Earl of Middleſex by the commons in 1623; and the charge againſt the Earl of Briſtol by the Duke of Buck-

(*f*) See the following Treatiſe p. 193. & Journ. Dom. Proc. 30. Nov. & 15. Dec. 1621. there cited. See alſo Journ. Dom. Proc. 27. March in ſame year. In the title to the printed edition of 1642, the book is mentioned to have been of *late reviſed* by Mr. Selden. This accounts for the book's containing ſome little matter ſubſequent to 1621. See p. 127, and 145. of the edition of 1642, where a ſtatute of 17. Cha. 1. is referred to. Probably there may be ſome differences between the manuſcript and the book in print.

(*g*) P. 194. & 84.

(*b*) See p. 103. & p. 46 to 51.

ingham,

ingham, with the counter charge by the former againſt the latter, in the parliament of the 1ſt of Charles the firſt. But there is a reference to *that* parliament as the *laſt*, which ſhews, that even this part was written either in or before Charles' ſecond parliament: and as to the book in general, it was probably written, whilſt Mr. Selden was employed by the lords in the parliament of 1620-1. (*i*) The criminal judicature of parliament is treated of in this book of Mr. Selden; and however he might be above being thus influenced into any partiality for the judicative claims of the lords, it is apparent, that he took pains to ſet forth every precedent illuſtrative of their right of giving the judgment in parliament; though it is but juſtice to add, that he is alſo aſſiduous in

(*i*) In a manuſcript copy of Selden's Judicature in Parliament lent to the writer of this preface by the Rev. Francis Egerton out of the library of his relation the Duke of Bridgewater at Aſhridge, there is the following notice, dated 30. Aug. 1627, concerning this book.

"DESUNT ADHUC:

"The judicature,—in reverſing erroneous judgments,—in deciding of ſuits "long depending,—in determining the complaint of particular perſons,—in ſet-"ting at liberty members of the parliament,—and in certifying the elections and "returns of knights and citizens for the parliament."

The date of this notice ſhews, that the book itſelf was written before 30. Aug. 1627.

What alſo ſhews the great probability of the book's being written for the moſt part before concluſion of the parliament of 1620-1 is, that though wholly on the criminal judicature, and though very full in aſſerting the right of the lords to give judgment, it makes not the leaſt mention of any of the criminal caſes adjudged by the lords in that parliament of the diſpute between the two houſes about criminal judicature in Floyd's caſe.

explaining

explaining how far he found the aſſent of the king and the preſence of the commons to be requiſite.---The third printed piece conſiſts only of a few pages, intitled "A Briefe Diſcourſe "concerning the Power of the Peers and Commons of Par-"liament in Point of Judicature." It was firſt printed in 1641, without any name. But in the reprint of 1651 in Cotton's Poſthuma it is with Sir Robert Cotton's name to it both in the title and at the end: and that Sir Robert did make ſome collections on the ſubject during the pendency of Floyd's caſe, appears from the Journal of the Commons for the 11th of May 1621; for there, in a debate about judicature, Sir Henry Montagu, afterwards Earl of Manchester, mentions his having received ſome books and notes from Sir Robert. The aim of the piece is to prove the right both of king and commons to concur with the lords in parliamentary judgments (*k*). According to Biſhop Nicholſon in

(*k*) The concluſion of this piece for the right of the king and commons to participate with the lords in the judicature of parliament is in the following words.

"Had not the journal roll of the higher houſe been left to the ſole entry of "the clerk of the upper houſe, who, either out of neglect to obſerve due form or "out of purpoſe to obſcure the commons right and to flatter the power of thoſe "he immediately ſerved, there would have been frequent examples of all times "to clear this doubt, and to preſerve a juſt intereſt to the commonwealth. And "how conveniently it ſuits with monarchy to maintain this form, leaſt others of "that well framed body knit under one head ſhould ſwell too great and mon-"ſtrous, it may be eaſily thought. For monarchy again may ſooner groan under "the weight of an ariſtocracy, as it once did, than under a democracy, which it "never yet either felt or feared."—As to the laſt paſſage, however, it muſt be confeſſed, that ſubſequent events did *for a time* overturn both the monarchical and ariſtocratical parts of our conſtitution. But the reſtoration renovated them, and they have flouriſhed ever ſince.

his

his Engliſh Hiſtorical Library, the piece is uſually aſcribed to Mr. Selden, though ſuſpected to have been written by Sir Simon D'Ewes. But the former's being the author is very improbable; and why the latter ſhould be ſo conſidered, is not explained.—A fourth piece, written either in 1621, or within five or ſix years afterwards, is the book on "The Manner of holding "Parliaments in England," by Mr. Elſynge, who in March 1620 ſucceeded as clerk in parliament. But the only part of that curious book having immediate connection with the judicature of parliament is the 8th and concluding chapter; which is on "Receivers and Triers of Petitions;" and being joined with lord Hale's learned reſearches on the ſame ſubject in the 11th and 12th chapters of the following Treatiſe, will be found to include almoſt every thing material to this introductory part of the ſubject of judicature in parliament to the time of lord Hale's death, which was in 1676. Nor ought this limited information from Elſynge to be ſlightly regarded; for it is not poſſible to have a thorough inſight into the nature of parliamentary judicature, without in ſome degree underſtanding the antient manner of receiving and diſpoſing of parliamentary petitions. And though the appointment of receivers and triers or auditors of petitions, at the beginning of a new parliament, has long in point of practice been conſidered as mere form; yet it ſeems ſtill to be open to any perſon at the beginning of a new parliament, by preſenting a petition to the receivers, within the time limited by the appointment of them, to call into action the duties both of receivers and triers or auditors, and ſo to reſuſcitate the antient manner of exerciſing parliamentary juriſdiction, or at leaſt to put it's ſuſceptibility of being ſo revived to a teſt. It is to

be conſidered alſo, that there may be caſes, which, from the failure of other modes of relief, may, at ſome future time, induce the trial of ſuch an experiment.

WE now come to the fourth and laſt parliament of James.—The preceding one had terminated in February 1621-2, by a diſſolution accompanied with as great wrath on the part of the king, as produced the diſſolution of his ſecond parliament; and there followed a like commitment of various members of the commons, amongſt whom were Sir Edward Coke and Mr. Selden, to the Tower. But in February 1623-4 the breaking off the match with the Infanta of Spain forced the meeting of another parliament, which continued till the 27th of March 1625, when it became diſſolved by the death of the king.

EXCLUSIVE of matters of privilege, and of ſome few caſes in which the lords aſſumed an original juriſdiction over miſdemeanors neither being relative to privilege nor founded on any complaint of the commons (*kk*), the great ſubject of *criminal* judicature in this parliament was Lionel Cranfield Earl of Middleſex; who was charged by the commons for bribery and other miſdemeanors in the offices of Lord Treaſurer and Maſter of the Wardrobe, and after long proceedings which are ſuppoſed not to have been diſagreeable to the king's favorite Villiers Duke of Buckingham was ſentenced by the lords to a ſevere puniſhment (*kkk*): and the only other caſe in the nature of an impeachment was that of Horſnet biſhop

(*kk*) Journ. Dom. Proc. 27. May 1624.

(*kkk*) See a full relation of the caſe in 6. Parl. Hiſt. 132. to 311.

of

of Norwich, on a complaint of the commons, which charged him with various miſdemeanors in his epiſcopal office, but never received the judgment of the lords (*l*). Whoever enters into the detail of thoſe two caſes will perceive, that, notwithſtanding the variety of practice in the preceding parliament, and the aid of antient rolls of parliament, the criminal accuſations of the commons and the proceedings of the lords upon them had not reached the ſort of formality of accuſation, defence, and trial, which belongs to impeachments of more modern (*ll*) times. Amongſt other things it is obſervable, that in the Earl of Middleſex's caſe the accuſation of the commons was in a manner *oral*, that the *king's counſel* and not the commons managed the accuſation when made, that the examination of the witneſſes was *before a committee* and upon *written interrogatories*, and that the *benefit of counſel* was harſhly and as it ſeems againſt precedents (*lll*) denied to him. But, as to the denial of counſel, the lords afterwards made an order for regulating the criminal judicature (*m*) in the court of parliament; and one part of this order provides for the allowance of counſel in future. In this order the lords deſcribe themſelves in lofty terms, and almoſt as if they alone conſtituted the high court of parliament: for in the beginning they are called "*the lords of the high court of parliament*," and in the concluſion they advert to calling one of their body to their bar as "the calling of a member of THIS *high court*," and

(*l*) Journ. Dom. Proc. 19. May 1624. and 6. Parl. Hiſt. 311. to 319.

(*ll*) See the remarks on Lord Treaſurer Middleſex's caſe in Selden on Judicature in Parliam. 64. 103.

(*lll*) Seld. on Judic. in Parl. 102.

(*m*) Journ. Dom. Proc. 3. April 1624.

therefore as a matter "fit to be very well weighed at what "time and for what cauſes" it ſhould be. A prior order made by the lords in the ſame ſeſſion ſtrongly tended to the eſtabliſhment of their judicative power in criminal caſes. It was an order poſtponing the eſtreat of fines impoſed by the houſe in their judicature till the end of the ſeſſion, in order to give the opportunity of mitigation in the mean time (*mm*). In it the lords call themſelves "this high court of the upper "houſe of parliament," and recite their often finding cauſe "in their judicature *to impoſe fines* amongſt other puniſh-"ments upon offenders for the good example of juſtice and "to deter others from like offences." Poſſibly it is owing in ſome degree to this very order, that the diſtinction between the judicature of the lords and that of the commons on breaches of privilege, according to which the former puniſh by fine, but the latter do not, became eſtabliſhed: for the order makes no difference between the judicature of the lords on impeachment and their judicature in caſes of privilege.

As to *civil* juriſdiction during this laſt parliament of the firſt James, the journal of the lords only mentions one writ of error, in which they made any order (*n*); and that was a caſe, which was removed by error, firſt from the king's bench in Ireland to the king's bench in England, and then from the latter court into parliament here. That there ſhould be only one ſuch caſe of error, may be conſidered as mere accident; and had more writs been brought, there is not the leaſt reaſon to

(*mm*) Journ. Dom. Proc. 28. May 1624.
(*n*) Journ. Dom. Proc. 28. May 1624.

ſuppoſe,

ſuppoſe, that the lords would not have equally acted without the participation of the commons. At leaſt it is underſtood, that before this (*nn*) time it was become the habit to frame the writ of error returnable into parliament as it is now framed, commiſſionating the lords without the commons; that is, with words expreſſing the object of ſo calling for the record to be (*o*), that the *king with aſſent of the lords* may amend the error.—But the lords did not confine themſelves to orders on writs of error; for their journal of this parliament ſhews, that they unheſitatingly made orders on private petitions of *original* complaint addreſſed to themſelves in caſes between party and party. The manner in general ſeems to have been thus. Firſt, the houſe of lords having early after the meeting of parliament (*p*) appointed a committee of lords to conſider of all petitions and to report to the houſe what anſwers were fit to be given, the petition went of courſe to the committee of petitions. Next upon their report the lords either themſelves

(*nn*) See p. 145. and 130. of the following Treatiſe.

(*o*) The king by the writ of error as now in uſe, after mentioning the king's being informed of error, commands ſending the record and proceſs and the writ into parliament, "that inſpecting the record and proceſs aforeſaid, WE may cauſe "further to be done thereupon *by the* ASSENT *of the* LORDS *ſpiritual and temporal* "*in the ſame parliament aſſembled*, for amending the ſaid error, as of right and "according to the law and cuſtom of England ſhall be meet to be done." But in Raſtall's Entries, tit. Error fol. 284. the COMMONS are mentioned, after the lords: and lord Hale conſiders the writ in Raſtall as having iſſued in Flourdieu's caſe 1. Hen. 7. See p. 130. and 145. of the following Treatiſe.

(*p*) In Journ. Dom. Proc. 19. March 1623-4 mention is made of the lords committees for petitions as a then exiſting committee: and it was agreed by the lords that ſuch lords committees "had power, according to the ANTIENT ORDERS "OF THIS HOUSE, to adjourn *de die in diem* as often as they pleaſe."

ſelves diſpoſed of the petition or referred the matter of it to others; and when they proceeded in the latter way, the reference was, ſometimes to particular lords, ſometimes to the courts of juſtice, ſometimes to judges and other aſſiſtants of their own houſe (*q*); and there is one inſtance of *directing* the great ſeal to commiſſionate referees named by the houſe (*qq*). Lord Hale in the following Treatiſe (*r*), attributing, as is mentioned before, this extenſion of judicature by the lords to their inſpecting the *placita parliamentaria* in the time of Edward the Firſt and applying them ſingly to their own body, remarks, that thereupon the lords, in this laſt parliament of James, began ſo to enlarge their juriſdiction, not only to cauſes of appeal, but almoſt to all kinds of matters in the firſt inſtance, that little was wanting to render the lords a ſettled court by petition to themſelves in all caſes as well civil as criminal. But, though in the courſe of thus taking conuſance of petitions, the lords ſeem to have ſo greatly ſtretched their judicature; yet, when directly addreſſed by petition to themſelves to relieve againſt an erroneous decree of equity, the houſe ſtill abſtained from undertaking to exerciſe this ſpecies of appellant juriſdiction. Of their forbearance in this reſpect, the caſe on the petition of Mr. William Matthews of Landaffe (*s*) is a ſtriking inſtance.

(*q*) See Journ. Dom. Proc. 9. 14. April 1624. & 8. 27. 28. & 29. May in ſame year.

(*qq*) Pinkey's caſe in Journ. Dom. Proc. 28. May 1624. See further concerning this caſe under the references as to what was done in the ſecond parliament of Charles, Journ. poſt.

(*r*) Page 194.

(*s*) Journ. Dom. Proc. 8. & 28. May 1624. and on the latter day obſerve the entry for the afternoon as well as for the forenoon.

He

He petitioned the lords, againſt a decree in chancery in a cauſe between him and Mr. George Matthews of the ſame place: and the lords committees of petitions examined the whole cauſe, and found a debt of £5160. upon the land in queſtion in favour of the former againſt the latter, and declared the land bound for the payment on particular days, and recommended the execution of this to the court of chancery. But on the afternoon of the very ſame day, this proceeding of the lords committees being reported to the houſe of lords, the latter, inſtead of confirming what the lords committees had done, ordered the cauſe to be reviewed in chancery by the lord keeper, aſſiſted by lords whom the houſe ſhould nominate and by two judges whom the lord keeper was to name. Had the order ſtopped here, it might have been conſidered as a mere delegation of authority by the houſe to the perſons thus appointed. But it was not ſo: for the order went on; and as if the houſe was conſcious of it's own want of power ſingly to do this, the order added, "*for which end* "the lord keeper is to be an humble ſuitor *unto his majeſty from* "*the houſe* for a COMMISSION (*ss*) unto himſelf and the lords "that

(*ss*) Concerning the practice of examining decrees in equity by commiſſion from the king, ſee p. 186. of the following Treatiſe and the references in the note there, to which add Williams's *Jus Appellandi ad Regem Ipſum* part i. ſect. 6. and part ii. page 35. to 114. From theſe references it will appear, that ſuch commiſſions are of antient origin; and particularly, that ſeveral were granted and acted upon in the reigns of Elizabeth the firſt James and the firſt Charles. The laſt inſtance of granting ſuch a commiſſion ſeems to have been in the 15. Cha. 1. on a decree of lord keeper Coventry in the caſe of Harvey and Langham againſt Uvendall. A copy of the inrollment of the commiſſion from the Rolls-chapel, and an extract of ſome proceedings under it from the regiſter's

" that ſhall be named by the houſe for the ſaid review and " final determination of the cauſe, as to them ſhall appear " juſt and equal." What makes this application to the Crown for a commiſſion to review the decree ſtill more ſtriking is, that between the report of the lords committees and the making this contrariant order by the houſe, though all was the buſineſs of the ſame day, there was a petition to the houſe from Mr. George Matthews againſt the order for which the lords committees had reported; and that in this petition he amongſt other things objected to thus reverſing the decree, that " it had been the courſe of the houſe to reverſe decrees " *but by bill legally exhibited,* eſpecially where no corruption " is proved." In the concluſion to the ſame petition the words are, " he humbly beſeeches, that he may have the " liberty of a ſubject, and that he may not be concluded, " and a decree ſubmitted unto overthrown, and the ſmall re- " mainder of his antient inheritance taken from him, *by order* " *of this honourable houſe only upon a petition.*" The intervention of this free remonſtrance againſt the report accounts for the conduct of the houſe, in altering the courſe, from reverſal of the decree by themſelves, to having a review of it under a commiſſion from the crown: and Lord Hale conſiders their ſo yielding, to a ſort of proteſtation againſt their right to reverſe decrees in equity on mere petition to

regiſter's office, are inſerted in 2. Williams's *Jus Appellandi ad Regem Ipſum.* Both parts of that work were written in 1684, to ſhew the right of the ſubject to ſuch a commiſſion, particularly during the intermiſſion of parliament, and alſo to induce the granting one in favour of the author againſt ſeveral decrees of lord chancellor Nottingham, there not being a parliament at the time, and conſequently there not being any immediate opportunity of examining the decrees in a parliamentary way.

themſelves

themſelves as "an inſtance of greater weight againſt the inhe-
"rent juriſdiction of the lords, than a cart-load of precedents
"ſince that time in affirming of their juriſdiction (*t*)." That at this time alſo there was at leaſt a doubt prevailing, as to the regularity of reverſing decrees in equity on petitions of appeal to the lords, appears further from the bringing in of bills to reverſe ſuch decrees, two bills of that kind having been read and twice committed by the lords in the preceding parliament about the very time of the report of Sir John Bourchier's caſe.

THUS, as it is conceived, ſtood the judicature of the lords on the acceſſion of king Charles the firſt in March 1625: and the prefacer having been gradually carried, in ſtating this ſubject of judicature for the preceding reign, into a larger conſideration, than either he profeſſed in the outſet to undertake, or is at preſent prepared further to proſecute, he will endeavour in his ſubſequent account to be more brief and general.

THE firſt parliament of Charles did not endure long enough to give an opening for much judicial buſineſs; for the firſt meeting was not till the 17th of May 1625 (*tt*); and the commons being backward in granting ſupplies and beginning to look into grievances and to point at the Duke of Buckingham the king's favorite, it was diſſolved the 12th

(*t*) See p. 197 of the following Treatiſe; where the reader will find other remarks upon and explanation of this caſe of Mr. Matthews very deſerving of attention.

(*tt*) 6. Parl. Hiſt. 402.

of Auguſt following; and whilſt it continued, there was much interruption by the prevalence of a plague in London, and by an adjournment on that account from Weſtminſter to Oxford. However, even the journal of this ſhort parliament contains ſome orders by the lords, ſeemingly founded on the ſuppoſition of an inherent original juriſdiction in them in civil caſes, and of a right to delegate the exerciſe to others as referees (*ttt*): and the journal alſo contains ſome proceedings on a writ of error (*u*), with one caſe in which there was a ſort of exerciſe of appellant juriſdiction by the lords over a decree of the court of requeſts (*uu*).

BUT Charles's ſecond parliament, which firſt met in February 1625-6, and the calling of which ſeems to have originated from the inſufficiency of a forced loan raiſed immediately after the preceding diſſolution (*uuu*), was more productive of matters of judicature.

THE *criminal* caſes before the lords, excluſive of privilege, were the charge of treaſon and other offences againſt Digby Earl of Briſtol (*w*) by the attorney general at the king's command, the charge by the Earl of Briſtol againſt Villiers

(*ttt*) Evelyn's Caſe Journ. Dom. Proc. 9. July 1625. and Brocas's caſe ibid. 5. Nov. in ſame year.

(*u*) Haines *v.* Crouch, Journ. Dom. Proc. 5. July 1625.

(*uu*) Edwards' petition, Journ. Dom. Proc. 9. July 1625.

(*uuu*) See Hume's Hiſt. chap. 50.

(*w*) 7. Parl. Hiſt. 3.

Duke

Duke of Buckingham and Lord Conway (*ww*) ſeparately, and the impeachment of Villiers Duke of Buckingham by the houſe of commons (*x*) for various crimes and miſdemeanors (*xx*). The two former of theſe accuſations grew out of the diſappointed negotiation in the late reign for the marriage with the Infanta of Spain. The laſt of them was not connected with the Spaniſh buſineſs; the charges relating to other matters, ſuch as ſale of offices, ſale of titles of honor, extortions, and various other corruptions and miſconduct alleged againſt him as a king's miniſter. But upon theſe criminal caſes it may be ſufficient to obſerve, that they all terminated with a diſſolution of parliament before any deciſion and never were revived: and that the modes of accuſation in the two former of theſe caſes have been ſince condemned as againſt law; namely, accuſation before the lords at the command of the king, impliedly and incluſively by the proceedings in the caſe of Lord Kimbolton and the five other committed members in 1641 (*y*) on the impeachment againſt attorney general Herbert for ſo accuſing them; and accuſa-

(*ww*) 7. Parl. Hiſt. 12. & 15.

(*x*) Ibid. 51.

(*xx*) Beſides the criminal caſes here mentioned, there was the caſe of Dr. Montagu, who was charged by reſolutions of the commons for writing books tending to ſet the king and people againſt one another, and to countenance popery. 6. Parl. Hiſt. 353. and 362. Articles of impeachment were read againſt him in the commons 14. June 1626. See Journ. Comm. for that day. But the parliament was diſſolved the day after, and ſo the impeachment dropped without reaching the lords: and two years afterwards he was made a biſhop. 8. Parl. Hiſt. 244.

(*y*) See p. 94. and 89. of the following Treatiſe, and 10. Parl. Hiſt. 166. 296. 310. and 444.

tion before the lords at the ſuit of private perſons, moſt expreſſly by an unanimous opinion of the judges in July 1663 on the impeachment of the Earl of Clarendon by the Earl of Briſtol ſon of the Earl before mentioned (*z*).

In reſpect to *civil* caſes in Charles's ſecond parliament, though not many, they are ſufficient to ſhew, that the houſe of lords not only perſevered, in acting like a court of original juriſdiction, and as being competent to exerciſe it and to commiſſionate others to act as referees (*a*); but ſometimes quite approached to a direct exerciſe of appellant juriſdiction over courts of equity, by ordering further hearings (*b*) before them. In the caſe of one petition, which ſeems to have been in the nature of an appeal from chancery, the lords, on a report from their committee of petitions, actually went the length of ordering the cauſe to be heard by counſel at the bar of the houſe (*c*) at a ſhort day.

(*z*) See p. 94. of the following Treatiſe, and p. 154. of the Proceedings againſt Lord Clarendon as publiſhed in 1700.

(*a*) See Pinkey's caſe Journ. Dom. Proc. 1. 2. 16. 17. & 23. March 1625-6. Sir Thomas Monſon's caſe ibid. 14. & 18. March of ſame year, the caſe of Walterhouſe *v.* Ingram ibid. 17. March 1625-6. the caſe of John Manning and others *v.* Muſcovy company ibid. 22. April 1626. Sir William Cope's caſe ibid. 31. March 1626. Starkey's caſe ibid. 17. April 1626. Moyne's caſe 22. April 1626.

(*b*) Morgan's petition Journ. Dom. Proc. 24. March 1625-6. Laſſenby *v.* Lord Scroop, ibid. 5. April 1626. Wright *v.* Archibald and Henn ibid. 9. May 1626. See alſo the before mentioned caſe of Pinkey.

(*c*) Grigſon *v.* Everard and wife Journ. Dom. Proc. 14. June 1626. poſt meridiem.

But,

But, before the day thus appointed, the king ſuddenly diſſolved the parliament, at the very moment the commons were preparing to preſent him, with a remonſtrance, againſt his levying tonnage and poundage without grant of parliament, and againſt other acts of his miniſters, and for removal of Villiers Duke of Buckingham from office (*cc*); and this meaſure was executed by the king, though to prevent a diſſolution the lords had moſt fervently and at the ſame time moſt reſpectfully petitioned the king againſt it (*ccc*).

THE third parliament of Charles, which, like the ſecond, was ſummoned after experience of the inadequacy of taxing under colour of prerogative (*d*), began to ſit in March 1627-8, and

(*cc*) The intended remonſtrance is given in 7. Parl. Hiſt. 309. from Ruſhworth. See alſo the king's reaſons for diſſolving the parliament in ſame vol. 300.

(*ccc*) 7. Parl. Hiſt. 298.

(*d*) See 6. Hume's Hiſt. 8vo. ed. of 1773. p. 222 & 238. The editor is poſſeſſed of a manuſcript volume, containing a ſelect collection of papers relative to parliament, prerogative, taxes, revenue, chancery, trade, and other important ſubjects political and legal in the reigns of James the Firſt and his ſon Charles. Amongſt other curious articles relative to taxation out of parliament, one is intitled "Taxes treated of at Council Table," and another which follows is intitled "Council Table Buſineſſes." Both appear to be minutes of the conſultations at a privy council after the expedition to the iſle of Rhe in July 1627, and before the calling of Charles's third parliament. The former of theſe papers is the minute of a conſultation about ſome perſon, who had not only refuſed contributing to a loan for the king, but had ſeverely cenſured both the meaſure as contrary to law, and thoſe who countenanced it by advancing money. The latter contains the minutes of the conſultations on raiſing £300,000 for the navy and £200,000. for the army by the king's impoſing of duties on beer and wine

and is memorable for paſſing the petition of rights (*dd*), and ſcarce leſs memorable in reſpect of the great ſhare the very eminent

wine and other ſuch things inſtead of calling parliament; and begins with the king's requiring to know, whether all preſent would aſſiſt him. Both of the papers too plainly ſhew, that the king was much encouraged by his then miniſters and adviſers in the raſh meaſures of an extra-parliamentary taxation. The perſons mentioned in the ſecond paper as ſpeaking at the council are the king, the earls of Dorſet, Suffolk, Saliſbury, and Carliſle, the biſhop of Durham, and the biſhop of Bath and Wells, who was Laud afterwards archbiſhop of Canterbury, he having been moved to Bath and Wells in 1626 and continuing to hold that biſhoprick till 1628. Some preſent are deſcribed only by the initials of their names; and amongſt theſe are D. B. and S. C. by the former of whom, as the editor conjectures, the Duke of Buckingham was meant. Others are deſcribed by their office; namely, the lord Treaſurer, the lord Preſident, the Chancellor of the exchequer, and Mr. Secretary. That the writer of this latter minute of conſultations was himſelf a privy councillor, is plain; for in the account of the firſt day's conſultation, after ſtating what the king required to know, the writer of the minute ſtates how he anſwered. The following extracts from this ſecond minute may perhaps not be unacceptable to the curious reader. The paper begins thus.

"The KING required to know, whether every man preſent would be willing "to give him aſſiſtance this way for the defence of the kingdom.

"If you command me to do any thing extraordinary, I ſhall obey you. If you "leave any to obey diſcretion, I ſhall then ſhew it.

"Into this "way all con- "curred. } "My anſwer was, the queſtion was of obeying the king, not "of counſelling the king, in which caſe I ſhould be as ready "dutifully to obey the king, as otherwiſe to counſel the king "faithfully.

"I

(*dd*) The writer of this preface has a manuſcript folio volume; which formerly belonged to Sir Robert Hyde chief juſtice of the king's bench after the reſtoration;

nent lawyer Sir Edward Coke, at the age of about eighty, had in obtaining that invigorating declaration of conſtitutional liberties.

In

« I ſtick not upon the particular laying it upon what is left and as eaſily as it « may be.

« The next day was handled the means, how to raiſe the ſum of £200,000. for « the army and £300,000. for the navy.

« It was propoſed, in the firſt place, what to impoſe upon.—Secondly in what « proportion.—Thirdly by what means to raiſe it.—Fourthly how to overcome « any oppoſition."

When the fourth conſideration is touched upon, the words of the minute are as follow.

« But deſcending to the laſt point, how to overcome difficulties, whether by « expreſſing the neceſſities, and that to move men by fair means or to enforce it.

« Perſuaſions, I thought, would not gain it: and *for judicial courſes, it would « not hold againſt the ſubject that would ſtand upon the right of his own property; « and againſt the fundamental conſtitutions of the kingdom.*

« The laſt reſort was to a proclamation: for in ſtar chamber it might be « puniſhable, and thereupon it reſted.

« The readieſt means, by way of impoſitions limiting a time, ſetting a propor- « tion and expreſſing a cauſe.

« The KING.—If there were any other way, I would tarry for your advice. « I can find no other real way, but this. For the particulars I have thought of « ſome.

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tion; and of which the greater part conſiſts of reports by and as it ſeems in the hand-writing of Sir Nicholas Hyde, chief juſtice of the ſame court at the time the

In this parliament of Charles the exercise of criminal judicature by the lords was not much occupied. There were only the case of Dr.

" ſome. If you can find any eaſier, I will hearken to it. To call a parliament, " the occaſion will not let me tarry ſo long.

" ER. DORSETT promiſed all diligence and faithfulneſs to any way the king " ſhould propound. I would not lay heavy upon the poor man, but proportion " things to be as eaſy as may be.

One particular the king propounded, as upon beer, wine, and ſuch things.

" E. SUFFOLK. Since there was neceſſity, he agreed to impoſe on theſe, wine " and beer.

" B. BATH. Where publick neceſſity preſſes, extraordinary ways are to be " admitted.

" The KING. I wiſh you to think of laying it, and to expreſs it to be but " temporary.

" CH. E. Your Majeſty cannot be relieved but by taking ſomething from " your people. The power, the cauſe, the proportion, are conſiderable. This " draws upon the propoſition of the alehouſes, yet avoids the name that is " not pleaſing, and may be uſed to be as profitable as putting it upon beer " or wine.

" D. B. Had you not ſpent all your means, and yet your friends loſt, *I would* " *not have adviſed this way.* But being raiſed to defend religion, your kingdom " and your friends, ***** I ſee no other way but this. Neighbor kings are " now beyond you in revenue. Whilſt your's were greater than theirs, your " other means ſufficed. Now it will not. *Therefore not I, but neceſſity of affairs.* " The way to be taken muſt be univerſal. That of the alehouſes is but parti- " cular profit. I anſwer not this: but all men muſt drink, and ſo all men " muſt pay."

The

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the petition of right was paſſed, and uncle of lord chancellor Clarendon. In one part of theſe reports there is an account of a ſingular conſultation of the judges by

Dr. Mainwaring (who was (*e*) ſentenced by the lords on an accuſation of the commons for maintaining a prerogative in the king

The remainder of the minutes is taken up with calculations of expence for the army and navy, the total of which is eſtimated at £600,000. and with remarks of different perſons as to the neceſſity of having an army as well as a fleet; and the Earl of Suffolk obſerves, that "the action of the Duke at the iſle of Rhee leads "on, beſides the other reaſons, to adviſe the army."

From theſe minutes of council it ſhould ſeem, that the Duke of Buckingham, previouſly to the holding of theſe councils about impoſing taxes out of parliament, adviſed the king ſo to proceed; that Sir Richard Weſton then chancellor of the exchequer and biſhop Laud were the principal ſupporters of the Duke's advice; and that all the privy counſellors preſent acquieſced, notwithſtanding their being apprized by the writer of theſe minutes of council, that ſo taxing was againſt the fundamental conſtitution of the kingdom, and ſo would not hold in point of judicial courſe. At the time of theſe conſultations lord Coventry was lord keeper; and it is obſervable, that he is not mentioned by name or office in theſe minutes. But ſtill, whether they come from him, muſt be left to conjecture.

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by the king five or ſix days before giving his firſt and qualified anſwer to the petition of right. The account begins with noticing the declaration of the lords to the king on the 26th of May 1628, that their intention was not to leſſen any things which by the oath of ſupremacy they had ſworn to aſſiſt or defend; and then it proceeds thus.

"Afterwards the ſaid 26. May the king ſent for the two chief juſtices Hyde and "Richardſon to attend him at Whitehall, who came unto his Majeſty, and who *in* "*private* delivered them a caſe, and requeſted them to aſſemble together all the judges, "and under their hands to get their anſwer thereunto, which caſe here followeth.

"I. QUESTION.

"Whether in no caſe whatſoever the king may not commit a ſubject without "ſhewing a cauſe?—Whereunto they made an anſwer the ſame day under their "hands,

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(*e*) 8. Parl. Hiſt. 151. 168. 204. 207. 211. 244. and 6. Hume *ut ſupra* 257.

king to require aid of the ſubject in time of neceſſity, and who ſoon afterwards was pardoned by the king and rewarded with a biſhoprick)

" hands, which was the next day preſented to his Majeſty by the ſaid two chief " juſtices, which followeth in theſe words.

" THE JUDGES ANSWER.

" We are of opinion, that, by the general rule of law, the cauſe of commitment " by his Majeſty ought to be ſhewn. Yet ſome caſe may require ſuch ſecrecy, " that the king may commit a ſubject without ſhewing the cauſe for a conve- " nient time.

" Which ſaid anſwer being delivered to his Majeſty by the ſaid two chief juſ- " tices, it pleaſed his Majeſty then to deliver a ſecond caſe; and he required them " to aſſemble all the judges, and under their hands to declare to him the law " therein, but required them to be *very ſecret and to reveal the matter to none, as* " *alſo he had done in the former.* Whereupon they all the next day aſſembled, and " after conſultation had, they all ſubſcribed their name to an anſwer to the ſame, " except lord chief baron, who by reaſon of ſickneſs was not preſent at their con- " ſultation; which reſolution was delivered to his Majeſty by the ſaid two chief " juſtices. This ſaid ſecond queſtion followeth in theſe words.

" Whether, in caſe a habeas corpus be brought, and a warrant from the king " without any general or ſpecial cauſe returned, the judges ought to deliver him " before they underſtand the cauſe from the king?

" THE JUDGES ANSWER.

" Upon a habeas corpus brought for one committed by the king, if the cauſe be " not ſpecially or generally returned, ſo as the court may take knowledge thereof, " the party ought by the general rule of law to be delivered. But if the caſe be " ſuch, that the ſame requireth ſecrecy and may not preſently be diſcloſed, the court " in diſcretion may forbear to deliver the priſoner for a convenient time, to the " end the court may be advertized of the truth thereof.

" This anſwer being ſo delivered his Majeſty then gave unto the ſaid two chief " juſtices a third queſtion, and commanded them to aſſemble their brethren forth- " with

biſhoprick) and the caſe of the Banbury rioters, which latter was adjudged by the lords on the complaint of a private perſon

" with and yield him an anſwer to the ſame under their hands, which they alſo " received. And the next day all met together; and after deliberation had, they " all ſubſcribed their names to an anſwer to the ſame, which by the ſaid two chief " juſtices was preſented to his Majeſty upon the 31ſt of May, *no perſon being* " *preſent with his Majeſty at any of the ſaid meetings.* The ſaid third queſtion " here followeth.

" 3. QUESTION.

" Whether, if the king grant the commons petition, he doth not thereby CON- " CLUDE himſelf from committing or reſtraining a ſubject for any time or cauſe " whatſoever without ſhewing a cauſe?

" THE JUDGES ANSWER.

" Every law, after it is made, hath his expoſition; and ſo this petition and " anſwer muſt have an expoſition, as the caſe in the nature thereof ſhall require, " to ſtand with juſtice, which is to be left to the courts of juſtice to determine, " which cannot particularly be diſcerned until ſuch caſe ſhall happen. *And although* " *the petition be granted, there is no fear of* CONCLUSION as is intimated in the " queſtion."

The ſame account goes on. It relates the giving of the king's firſt anſwer to the petition of right on the 2d of June 1628, the conference of the lords and commons on the 7th of June, their joining to petition the king for a more clear and ſatisfactory anſwer, and the king's compliance the afternoon of the ſame day, as to which ſee 8. Parl. Hiſt. 146. & 201.—Of king Charles's conſulting his judges ſoon *after* the paſſing of the petition of right, and when he had diſſolved his third parliament and had committed Mr. Holles, Mr. Selden, and Sir John Elliot for their parliamentary ſpeeches, there is already an account in print both in Ruſhworth and in vol. 8. of the Parliamentary Hiſtory. But the prefacer doth not recollect any printed ſtatement of this *ſecret* communication between the king and his judges *before* his paſſing of that famous law; and therefore hopes, that the introduction here of an occurrence, though foreign to the judicature of parliament, will be excuſed. It is for future writers of Charles's reign to make the

by petition to themſelves (*ee*), and conſequently was an aſſumption of original juriſdiction over miſdemeanors unconnected with privileges or impeachment. But there was a great abundance of *civil* caſes. The reſult of theſe is, that the lords were making great advances towards fixing in themſelves an *univerſal* juriſdiction both *original* and *appellant* over cauſes between party and party, the orders of the houſe in this reſpect extending to ſpiritual courts as well as temporal (*f*). But

full comment upon ſo extraordinary an occurrence, and to connect it with his ſubſequent proceedings. But even here it may perhaps be allowable to lament, that a Prince, in many reſpects amiable and accompliſhed, ſhould be ſuch a devoted ſlave to claims of regal prerogative, as, at the very moment before unqualifiedly paſſing a law for declaring the rights of his ſubjects, to concert undermining the declaration by clandeſtinely obtaining a ſalvo of evaſion: and that judges, on many accounts eſtimable men, ſhould be ſo forgetful of duty, as to lend themſelves to a purpoſe certainly diſgraceful in it's project and probably ruinous in it's conſequences. Sir Randolph Crew had been recently removed from the chief juſticeſhip of the king's bench; and ſo eſcaped being a party to this clandeſtine concert of the king and his judges, or rather was removed from an apprehenſion of his being too firm to be won into the meaſure. His ſucceſſor Sir Nicholas Hyde was leſs fortunate: for he had been recently promoted to the ſame chiefſhip. At leaſt he was treated as a judge, from whom obſequiouſneſs was expected. Yet, only fourteen years before, he had been appointed by the houſe of commons, one of the managers for arguing at a conference with the lords againſt tonnage and poundage without act of parliament.

(*ee*) Journ. Dom. Proc. 2. April 1628.

(*f*) See for the *exchequer* the bailiff of Stow's caſe, Journ. Dom. Proc. 1. April 1628. for *chancery* Starkey *v.* Starkey, Ibid. 30. May 1628. for the *ſpiritual* courts, Vaughan's petition, Ibid. ſame day, and Briſtol caſe, Ibid. 7. Feb. 1628-9. for court of *wards* Earl of Warwick's petition, Ibid. 22. May 1628. and for *original* cauſes, Sir Francis Conningſby's caſe, Ibid. 31. May 1628. Margaret Dyer's caſe, Ibid. 18. June 1628. and 16. Feb. 1628-9. Crokey's caſe, Ibid. 24. 27. & 31. Jan. in ſame year, and Iſle of Rhee caſe, Ibid. 14. Feb. 1628.

yet

yet perhaps there will not be found a *direct* precedent of expreſs petition of appeal from a decree in equity, with ſuch a *full hearing* of the cauſe by the lords and ſuch a *full order* expreſsly affirming or reverſing, as to be a complete unequivocal exerciſe of equitable appellant juriſdiction by the lords themſelves. Probably alſo this may be what is meant by lord Hale, in the following Treatiſe (*g*), where he ſtates, that he could never yet ſee any precedent of greater "antiquity "than the 3. Cha. 1. nay, ſcarce before 16. Cha. 1." It is alſo ſome evidence againſt an earlier full exerciſe of appellant juriſdiction by the lords over cauſes in equity, that, when Charles's fourth parliament was diſſolved, three bills for reverſing three ſeveral decrees of chancery were depending before the houſe of commons (*gg*).

(*g*) See p. 194.—Note on the petition of Lady Leke againſt Lord Deyncourt 12. Feb. 1628-9, the lords expreſsly confirmed a decree. See Journ. Dom. Proc. of that day. But the petition was to take away his *privilege*, which prevented the decree from having effect; and therefore it was not quite an *appeal* caſe.

(*gg*) The editor aſſerts this fact on the authority of the already cited manuſcript volume of papers relative to Parliament, Trade, Revenue, Chancery, and other important matters of a public nature, in the reigns of James the Firſt and his ſon Charles. See before p. xlv. note (*d*). One of the papers in that volume is entitled "A Note of ſuch Bills which were in Agitation in the Houſe of Com-"mons the laſt Seſſion of the laſt Parliament 4. Caroli Regis." The Note mentions three bills for reverſing decrees of chancery: namely, one in the cauſe of Sir Arnold Herbert knight and others againſt Lawrance Locons, Peter Bland and others; another in the cauſe of Searles againſt Searles; and a third in which Sir Thomas Jeremy and Dame Joan his wife were concerned. The ſame Note mentions a bill for reverſal of a decree of the court of wards and liveries, and a bill confirming a decree of lord Coventry who had been made lord keeper two or three years before.

CHARLES'S

CHARLES's fourth parliament did not very long ſurvive paſſing the petition of right. That law had the king's aſſent the 7th of June 1628; and the king prorogued the parliament on the 27th of the ſame month, when a remonſtrance to the king againſt levying tonnage and poundage without conſent of parliament was actually reading in the houſe of commons (*b*). Felton's horrid aſſaſſination of Villiers Duke of Buckingham ſoon followed: and upon that event, Lord Treaſurer Weſton, afterwards Earl of Portland, and biſhop Laud, afterwards archbiſhop of Canterbury, became chief adviſers of the crown, or at leaſt were ſo conſidered at the time (*bb*). But whether the famous Sir Thomas Wentworth Earl of Strafford, who had warmly oppoſed in parliament Charles's irregular and unconſtitutional meaſures, and had ſuffered impriſonment for refuſal to comply with a forced loan, and had alſo actively ſupported the petition of right, but recently had been taken into the king's favour and ſucceſſively made baron and viſcount, was yet enough advanced in the king's confidence to be reckoned in the ſame way, ſeems uncertain (*i*). Then the parliament was re-aſſembled, and was allowed

(*b*) See 8. Parl. Hiſt. 241. and Sanderſ. Hiſt. of Cha. 1. p. 116.

(*bb*) 1. Ruſhw. 662.

(*i*) See Append. to Strafford's Letters, at the end of vol. 2. p. 430. However, from the ſtile of a letter of Lord Treaſurer Weſton to Lord Strafford dated 8. September 1628, which was only a fortnight after the Duke of Buckingham's death, it appears that the Treaſurer looked up to Strafford both for counſel and for ſupport. See Ibid. vol. 1. p. 47. It has been obſerved, in favour of the quick tranſition, from Lord Strafford's being impriſoned for not acquieſcing in a forced loan and warmly ſupporting the petition of right, to his being made a peer and advanced

allowed to ſit from the 20th of January 1628-9, to the 25th of February. But the king, ſtill finding the commons pertinacious, or, to expreſs it more juſtly, firm and reſolved againſt tonnage and poundage without act of parliament and againſt other irregular meaſures of his government, adjourned the two houſes, and on the 10th of March proclaimed a diſſolution under circumſtances of even outrageous quarrel (*l*).

ELEVEN years now paſſed without any parliament; and during that long ſpace Charles and his miniſters contrived to ſupply the defect of parliamentary aids, by adding ſhip-money to tonnage and poundage, and by reſorting to various other devices of extra-parliamentary taxation; as if there was a perfect oblivion of the petition of right; and as if that recent declaratory law againſt ſo charging the ſubject had no binding force againſt the Crown, or, to uſe the language of himſelf and his judges on another branch of the ſame law, did not CONCLUDE him (*ll*). But at length (*m*) the inſurrection of Scotland and other exigencies impelled Charles to call a new parliament; and a new one, being the

advanced into high office under the Crown, that after granting the petition of right there was no reaſon for declining royal favour. See the dedication to the Straffford Letters. But how could it be conſiſtent, that a zealous ſupporter of the petition of right, one great object of which was to condemn levying taxes *without grant of parliament*, ſhould immediately afterwards act with miniſters, who perſiſted in taxing at the ports by *prerogative*?

(*l*) See 8. Parl. Hiſt. 327. to 335. Sanderſon's Life of Cha. 1. p. 130.

(*ll*) Hume's Hiſt. chap. 52. & p. li. before in the note there.

(*m*) Hume's Hiſt. chap. 53. 8. Parl. Hiſt. 396. and Clarendon's Hiſtory, firſt book.

fifth

fifth called by Charles, met accordingly in April 1640. It was, however, both ſhort and inauſpicious. The king was urgent for ſupplies. But the houſe of commons was obdurate, and inſiſted upon firſt examining the aggregate of grievances; and when the lords interpoſed to ſecond the king's ſolicitations, voted it a breach of privilege. The commons ſtill perſiſting to poſtpone ſupply, the reſult was a diſſolution of parliament in leſs than a month after it's being aſſembled: a meaſure, which lord Clarendon in a manner imputes, to the malice of Secretary Vane and the injudiciouſneſs of Herbert ſolicitor general, connected with the apprehenſion of a ſpeedy condemnation of ſhip-money; and which the king is ſaid afterwards to have heartily repented. The journals of the two houſes for this ſhort ſeſſion contain ſome important explanations of the conduct of public affairs during the preceding long intermiſſion of parliaments. But there doth not appear ſo much as a commencement of buſineſs of judicature of any kind; though it is obſervable, that the lords began with appointing a committee for petitions (*mm*).

WITHIN four months after the diſſolution of Charles's fifth parliament, the Scotch army entered England (*n*); and their rout of a part of the king's forces at Newbourn, though followed with a treaty of accommodation, ſoon forced the king into the meaſure of once more aſſembling the legiſlature. Accordingly, by the advice of a great council of peers at York, Charles ſummoned his ſixth and laſt, or, as it is uſually called, the *long* parliament. It firſt met the third day of

(*mm*) Journ. Dom. Proc. 16. April 1640.

(*n*) See Clarend. Hiſt. book 2. Hume's Hiſt. chap. 53. and 9. Parl. Hiſt. 1.

November

November 1640. To look this great æra of our hiſtory in the face for a moment on the preſent occaſion, might be extremely interruptive to the ſubject now under conſideration: for who can ſurvey the origin and progreſs of a long civil war, and the incidental aggregate of human calamities, without danger of being abſorbed in the ſubject? Such, as are qualified by underſtanding to make a juſt eſtimate, and at the ſame time are not overcome by paſſion, may ſee, on both ſides engaged in the dreadful conflicts of the nineteen years previous to the reſtoration, much to approve, much to condemn, much to admire, much to abhor, much to compaſſionate. On the popular ſide, at firſt it was, or at leaſt appeared, a conteſt to preſerve law and conſtitution againſt the encroachments of the crown and its miniſters; though even in the outſet that conteſt was ſtained by ſome diſguſting and even ſanguinary exceſſes. Afterwards the ſame conteſt degenerated into a compound of tyranny and anarchy; and ſo our monarchy was overthrown, and our ariſtocracy was cruſhed, and yet a democracy was not obtained, all the gain conſiſting of a merely nominal republic. But like a fever in the natural body, where at laſt extinction is eſcaped, this political diſeaſe happily had its period of duration; and when that was compleated, health returned rapidly, and the three great components of our conſtitution were ſuddenly revived and became ſuddenly reunited. As for precedents of any kind during a time ſo boiſterous and diſtempered, they are in almoſt all points to be diſtruſted. In the particular inſtance of judicature in parliament, the ſhort ſtatement is this. Whilſt in *form* the two houſes had the rule, moſt of the powers of government were in *effect* monopolized by the commons; except that judicature ſeems to have been very much left to the lords.

So it went on till about the time of the king's fatal catastrophe (*nnn*); which was preceded by a vote of the commons,

(*nnn*) Some reſiſtance however there was to the extended and ſole exerciſe of judicature by the lords as early as 1646 and 1647. The caſes of Lieutenant Colonel Lilburne in 1646-7 and of Sir John Maynard in the year following are inſtances of this, and will be made the ſubject of a ſubſequent note. Between thoſe two caſes alſo there occurred a circumſtance very threatening to the lords in their judicature as well as in other points. For in Auguſt 1647 general Sir Thomas Fairfax and the council of the parliament's army agreed upon heads of a propoſal from them to the parliament's commiſſioners reſiding with the army; and two of the articles were aimed at the judicature of the lords. The articles affecting that judicature as given in Ruſhworth, Part IV. p. 732. were,

" That the *judicial power* or *power of final judgment in the* LORDS and COMMONS, and *their power of expoſition and application of law without further appeal, may be cleared*; and that no officer of juſtice, miniſter of ſtate or other perſon adjudged by them may be capable of protection or pardon from the king without their advice or conſent."

" That *the right and liberty of the* COMMONS *of England may be cleared and vindicated, as to a due exemption from any judgment trial or other proceeding againſt them, by the* HOUSE OF PEERS *without* THE CONCURRING *judgment of the* HOUSE OF COMMONS; as alſo from *any other judgment* ſentence or proceeding againſt them, *other than by their equals* or according to the law of the land."

The former of theſe articles clearly includes a claim to have a declaration, that the *ſupreme appellant juriſdiction* belonged to the *houſe of lords* and *the houſe of commons*, JOINTLY. The latter is not ſo ſpecific in its requiſition. But it apparently points againſt the exerciſe of ORIGINAL *juriſdiction by the* LORDS *over commoners* without a *concurrence* of the HOUSE OF COMMONS.

To this extract from the heads of propoſals from the parliament's army, it may be proper to add, that the attack of the juriſdiction of the lords in 1647 was not confined merely to the caſe of Sir John Maynard: for ſeveral other impeachment caſes, about the ſame time, and in ſome degree connected with his, appear

to

mons, declaring themſelves the ſupreme power of the nation and their acts to be laws without the concurrence of king or lords, and was almoſt immediately followed by ordinances, expreſſly aboliſhing both the monarchical and ariſtocratical parts of our conſtitution, and ſubſtituting a government by the exiſting houſe of commons only, ſuch as that houſe in its then reduced ſtate was, with a council of ſtate to act as the executive power under their orders (*nnnn*). All

to have involved the ſame conſideration. In Mr. Clement Walker's Hiſtory of Independency Part I. there is a long and intereſting but rather a confuſed account of Sir John Maynard's caſe and thoſe connected with it. In page 61 of ſame book there are ſome arguments by the author Mr. Walker againſt the judicature of the lords, particularly where it is exerciſed over commoners. After ſome previous remarks, and eſpecially ſome references to three printed pieces intitled "Sir John "Maynard's Royal Quarrel and his Law's Subverſion,"—"Lieutenant-Colonel "Lilburne's Whip for the preſent Houſe of Lords,"—and "Judge Jenkins's "Remonſtrance to the Lords and Commons of the two Houſes of Parliament, "dated 21. Feb. 1647,"—Mr. Walker aſſerts, that *without the king's ſpecial authority* the lords have not any judicature. This he undertakes to prove by three reaſons. His firſt reaſon is the derivative power of the lord chancellor or keeper, and of the judges of the king's bench common pleas and exchequer. His ſecond reaſon is an aſſertion, that the king's appointment of a lord high ſteward is eſſential to the trial of a peer in parliament; which aſſertion is according to the opinion of lord keeper North on the Earl of Danby's impeachment in the reign of Charles the Second, as appears in the life of lord keeper North by his brother Mr. Roger North, but was in principle overruled in the Earl of Ferrers's caſe in 1760, upon the reaſons of which there is a learned explanation by Judge Foſter in his report of the latter caſe. Mr. Walker's third reaſon was, that on error the lords derive their authority from the writ iſſued by the king out of chancery. To theſe three reaſons Mr. Walker ſubjoins ſome ſtrong obſervations againſt the proceeding by articles of impeachments, as if the proceeding by *bill* was the only conſtitutional mode of proſecution in parliament.

(*nnnn*) See Journ. Comm. 6. Jan. 1648-9. and 6. & 7. Feb. in ſame year. The ordinance for aboliſhing the kingly office was paſſed 17. March 1648-9, and

theſe extremities having been accompliſhed, nominally by the houſe of commons, but really by a minority of that houſe backed by the army; that houſe, or rather the ſmall remnant of it, as inſtruments of thoſe who from their aſcendancy over the army arbitrarily diſpoſed of every thing, became poſſeſſed of the whole ſovereignty; and from this extraordinary change, the laſt ſeal to which was put by ordinances paſſed in February 1648-9, the houſe of lords was forced into a complete ſtate of dormancy for above ten years ſucceſſively. Whilſt however the lords were permitted to exiſt, acting under the extremities of a government carried on without its conſtitutional head, and under the circumſtances of ſuch a partition of power with the other houſe as is before deſcribed, they naturally fell into the aſſumption of much more judicative power than had before been their ſhare. Accordingly we find, that very ſoon after the beginning of the long parliament the lords, upon petitions to themſelves, exerciſed both original and appellant juriſdiction, as well in cauſes of equity (*o*) as of law; extending their orders, even to the puniſhment of miſdemeanors, and to the awarding of damages,

and that for taking away the houſe of peers the 19th May 1649. On the latter day there was alſo paſſed an ordinance declaring "the people of England to be a "commonwealth and free ſtate," and governable as ſuch "by the ſupreme authority "of this nation the repreſentatives of the people in parliament, and by ſuch as "they ſhall appoint and conſtitute as officers and miniſters under them." All theſe ordinances are printed in Scobell.

(*o*) As far as the editor has yet obſerved, the firſt direct petition to the lords during the long parliament for reverſal of a decree in equity was on 23. Jan. 1640-1 by lady Moulton againſt a decree and diverſe orders of lord keeper Finch; and the firſt direct reverſal of ſuch a decree by the lords at any time was on 9. Feb. 1640-1. See Journ. Dom. Proc. accordingly.

and

and ſo arbitrarily encroaching upon and controuling the ordinary juriſdictions of the kingdom, and invading the functions both of judges and juries. The truth of this remark will appear, from an abundance of inſtances, to any, who examine the Journal of the lords from November 1640 to the end of 1641, without being at the trouble of further purſuing the inquiry (*oo*). But to draw precedents of judicature in

(*oo*) Notwithſtanding the great exceeding of the lords in point of judicature, between the firſt ſitting of the long parliament and the ordinance of the commons for aboliſhing the upper houſe, it ſeems not to have been in any degree reſiſted, till about 1646, when Colonel John Lilburne, the fiery ebullitions of whoſe religious and political enthuſiaſm were ever involving him in ſtate-proſecutions, and the invincibleneſs of whoſe courage enabled him to triumph under the conſequences of them, having been queſtioned by the houſe of lords for a book ſlandering the Earl of Mancheſter and alſo the law of England, gave in a warm plea in writing proteſting againſt their juriſdiction, and appealing to the commons of England. The reſult was, that for his writings including his plea of proteſtation, he was ſentenced by the lords in a fine of £4000. to impriſonment in the Tower for ſeven years, and to incapacity of office during life. See Journ. Dom. Proc. 10. 11. July & 17. Sept. 1646. 14. Parl. Hiſt. vol. 14. p. 445. & 462. & vol. 15. p. 18. to 29. and vol. 17. p. 349. His writings were in ſome reſpects very provoking, and in general very hot. His conduct alſo before the lords was very boiſterous. He refuſed to kneel at the bar of the houſe, ſtopped his ears with his hands to prevent hearing the charge, and addreſſed the lords in very furious language. This perhaps may in ſome degree account for their being betrayed into an exceſs both of puniſhment and of their conſtitutional powers. Some months after Lilburne's caſe, the lords met with a ſimilar reſiſtance to their judicature from one, who was of a graver caſt and by no means a fanatic or an enthuſiaſt. This latter perſon was the famous lawyer Sir John Maynard; who, being impeached by the commons before the lords for *treaſon* as well as miſdemeanor, and finding himſelf at their bar *with the doors of their houſe ſhut*, refuſed to ſubmit to their juriſdiction, inſiſting, that it was a caſe for trial by a jury in the ordinary courts of juſtice; claimed to be heard by counſel againſt their proceedings; and even refuſed to kneel at their bar. Though alſo he was fined £500. for not ſubmitting himſelf to the uſual courſe of the houſe, he ſtill perſevered

in parliament from proceedings during a time of ſuch exceſs, would be at one moment to prove almoſt all kinds of judicative powers centered in the lords, and the next to prove the non-exiſtence of their body. What therefore Lord Hale, who was himſelf a witneſs of the calamity from beginning to end and profeſſionally no inconſiderable actor (*ooo*), has

perſevered in his reſiſtance; refuſing to hear the articles read; and when they had been read, declaring, that he had not heard them, and that in compariſon with the proceedings of the lords againſt him he admired thoſe of the condemned ſtar-chamber. See 6. Parl. Hiſt. 517. & Journ. Dom. Proc. 5. Feb. 1647-8. This was ſubſtantially reſiſting the lords in their judicature in much the ſame way as had been recently done by Lilburne. Theſe two caſes terminated thus. Sir John Maynard was never tried on the impeachment againſt him; but he was diſabled from his ſeat in the houſe of commons by order of that houſe, and was kept out till June 1648, when the order againſt him was revoked. Lilburne ſuffered longer and more ſeverely: for he was kept a priſoner two years in the Tower. But he was at length releaſed, and had the remaining puniſhment remitted by the lords on application of the commons; and the propoſer of this interpoſition on his behalf was Maynard, whoſe ſpeech on the occaſion has reached the preſent times. See 17. Parl. Hiſt. 349. Journ. Comm. Aug. 1648. and Journ. Dom. Proc. for the following day. Further particulars about Lilburne may be ſeen in the article of his life in the Biographia Britannica, being one of the moſt laboured in that valuable collection. It is to be wiſhed, that, in the new edition of that inſtructive work, the like pains may be taken with the life of Prynne, who was a fellow ſufferer with but finally a determined opponent of Lilburne. The life of Prynne in the original edition is executed in a very ſlight manner. Executed upon the ſame ſcale and with the ſame ſucceſsful induſtry as the life of Lilburne, it would throw great light upon the hiſtory of the time. Till there ſhall be ſuch a full life of Prynne, the account of him in Wood's Athen. Oxon. being much fuller than what is in the Biograph. Britann. and containing a liſt of his numerous works, may be uſefully ſubſtituted.

(*ooo*) Lord Hale was 31, when the long parliament firſt met. He was junior counſel to archbiſhop Laud on his impeachment, and was counſel for ſome of the principal royaliſts on their trials, and was to have been counſel for the unfortunate Charles the Firſt, if all hearing for him had not been prevented by his ſpirited and becoming denial of the juriſdiction.

expreſſed

expreſſed in the following Treatiſe with his uſual plainneſs and diſpaſſionateneſs, is perhaps placing the judicial acts of the lords in the long parliament in the proper light: for he ſhortly ſtates the thronging of complainants eſpecially to the houſe of lords, and their promiſcuouſly hearing all complaints of decrees, ſentences, and judgments, but at the ſame time treats their proceedings as too tranſported beyond the known proper bounds to count as precedents for regular times (*p*).

How the judicature of parliament was exerciſed from the ſuperſeding of the kingly office and of the houſe of lords till the reſtoration; or whether in the parliaments during that interval, if ſuch curtailed and irregular aſſemblies are to be ſo called, any judicial buſineſs beyond caſes of privilege was tranſacted; it would require a long inveſtigation of the remaining entries of their proceedings to aſcertain; and to enter particularly into ſuch a field of inquiry at preſent, would too much delay the proſecution of the ſubſequent and more material parts of the ſubject under conſideration. But probably at leaſt the appellant part of ſuch judicature was in a ſtate of ſuſpence and inactivity: and perhaps the executive government for the time being thought this defect ſufficiently ſupplied, by iſſuing writs of error and commiſſions of delegates under the great ſeal of the commonwealth, to examine judgments decrees and ſentences, in the ſame kind of way out of parliament, as was uſual before ſubverſion of the monarchy. In one inſtance, however, proviſion was made

(*p*) See p. 194.

to

to regulate appellant juriſdiction: for the protector Cromwell, by advice of his council, made an ordinance (*q*) in 1654 for limiting the juriſdiction of chancery and regulating its proceedings; and by it he conſtituted a very reſpectable mode of examining the decrees of that lofty court. The mode was giving a rehearing before the lord chancellor or lord keeper of the great ſeal joined by ſix judges, of whom two were directed to be taken out of each of the courts of the upper and lower bench and the exchequer, and of whom alſo one was to be a chief juſtice or chief baron; and authorizing the forum thus conſtituted to make a final order. To the ordinance containing this proviſion for appeal from decrees of chancery, Sir Bulſtrode Whitelocke firſt lord commiſſioner of the great ſeal, Sir Thomas Widrington one of the other two commiſſioners, and Mr. Lenthal maſter of the rolls, made great objection. They even remonſtrated with the protector Oliver Cromwell againſt executing the ordinance; and the two former, conſcientiouſly perſevering, were removed out of office. The nature of ſome of theſe objections is fully ſtated in Sir Bulſtrode Whitelocke's Memorials (*r*): and thence it appears, that the propriety of the appeal given was not particularly objected; except that it ſeems, as if, beſides the ſpecified objections of inconvenience, Whitelocke, and the two who joined him, had conſidered the ordinance as in ſome points legiſlating, and therefore beyond the authority of Cromwell and his council.

(*q*) Scobell's Ordinances for 1654. chap. 44. ſect. 63.

(*r*) See p. 621. to 627. of ed. 1732.

THE

THE next ſtep in our narrative is to the Reſtoration.

BUT before coming to that æra of return of the antient Engliſh conſtitution, it may be conducive, to a better underſtanding of the conteſt which ſoon followed between the two houſes about judicature in parliament, to take notice, not only of a relative work of no inconſiderable importance, firſt written and publiſhed in 1647 by a learned but very peculiar and eccentric author, when both the kingly office and our houſe of peers were for a time in their wane, but alſo of the provocations under which the book was written.

EVEN in the outſet of the war between the firſt Charles and the two houſes of parliament, an inveterate enmity to both the monarchical and ariſtocratical parts of our government was more eſpecially current with a party conſiſting of thoſe uſually called *Levellers (rr)*; who, under the profeſſion of perfect equality, aimed at ſubverting the rights of property, or rather almoſt every ſpecies of acquired rights; ſome wildly expecting to meliorate civil government by newly conſtituting it; and others deceitfully projecting to lift themſelves into wealth and power, by ſtripping the preſent poſſeſſors and

(*rr*) This name is ſaid to have been firſt given by Charles the Firſt in the paper which he left on his eſcape from impriſonment at Hampton Court and taking refuge in the iſle of Wight. It is at leaſt ſo ſtated in 4. Harleian Miſcellany in a pamphlet, which was publiſhed in 1659 to explain and juſtify the principles of thoſe called *Levellers*. The title of this pamphlet was "The LEVELLER; or, "the Principles and Maxims concerning Government and Religion, which are "aſſerted by thoſe commonly called LEVELLERS." Great caution is requiſite in claſſing perſons amongſt Levellers: for, from the perverſions of party ſpirit, the appellation is often moſt groſſly miſapplied.

working themſelves into their place. As the war between the king and the two houſes of parliament proceeded, theſe perſons were continually gaining ſtrength; and what at length tended vaſtly to increaſe their conſequence was, that for a time they had been found convenient inſtruments to the towering ambition of Oliver Cromwell and the deep views of his partizans, in new modelling the parliamentary army, and in other enterprizes againſt thoſe who had hitherto guided publick affairs on the part of the two houſes. Under ſuch circumſtances it was to be expected, that the preſs ſhould teem with publications againſt monarchy and ariſtocracy. So accordingly the fact was in 1647 and for ſome time before (*s*): and amongſt the moſt conſpicuous pamphleteers againſt a king and houſe of lords ſtood lieutenant-colonel John Lilburne, memorable for the ſeries of ſtate proſecutions againſt him under the ſucceſſive adminiſtrations and various changes of government between 1635 and the reſtoration, and ſo zealouſly and invincibly exceſſive in his democratic principles as to be deemed the Coryphæus of Levellers, or to uſe Mr. Prynne's coarſer diction "the ringleader of the "regiment of new firebrands." The more immediate object of attack with this deſcription of writers was the houſe of lords: for as to the kingly office, it's functions were already ſo ſuppreſſed, as to make the attack of it but a ſecondary object. The chief run, therefore, was at the peerage: and not content with ſtating wherein the lords in point of judicature or otherwiſe had exceeded the due bounds, Lilburne and his fellow-labourer Overton, with other champions in the ſame

(*s*) See the writings cited by Prynne in his Plea for the Lords, p. 2. & 4. of the edition of 1658.

cauſe,

cauſe, attacked the order itſelf; repreſenting the peerage as the offſpring of an uſurped prerogative of the crown, degrading the peers from an hereditary council for public good into mere creatures and ſubſervient inſtruments of royalty, denying to the houſe of lords all right to any ſhare either of legiſlative or judicial power (*ss*), and affirming the ſupreme power to be in the houſe of commons only (*sss*). To encounter theſe extravagant

(*ss*) The denial by Lilburne of all judicial power to the lords was objected to him by Prynne as a great inconſiſtency; the latter ſtating, that Lilburne *had himſelf ſued the lords by petition* to reverſe the outrageous ſtar-chamber ſentence againſt him and to compenſate him with damages. See Prynne's Plea for the Lords, edit. of 1658. p. 422. That the ſtar-chamber ſentence againſt Lilburne was reverſed as unjuſt and illegal, and accordingly vacated by an order of the lords after hearing Mr. Bradſhawe whom they had aſſigned as Lilburne's counſel, appears by the Journal of the Lords for the 2d and 13th of February 1645-6. But it may be doubted, whether this was done on *a petition to the lords from Lilburne*; for in their Journal of 26. Jan. in ſame year, there is an entry of *a meſſage from the commons* deſiring the concurrence of the lords "in two votes concerning the unjuſt ſentence in the ſtar-chamber againſt John Lilburne;" and there follows an order of the lords upon that ground. The two reſolutions, to which the commons thus deſired the concurrence of the lords, had been made as long ago as 5. May 1641. but had been ſuffered to be dormant. However, whether Lilburne actually petitioned the lords to reverſe the ſtar-chamber ſentence or not, it appears certain from Prynne's ſtatement, out of Lilburne's writings in another place, that he not only ſometimes had extolled the lords for having done juſtice to him, but had occaſionally denied the power of the houſe of commons without the lords. See p. 46. & 47. of Prynne's Plea for the Lords. In truth both Prynne and Lilburne were ſo open to the charge of inconſiſtency, that in that reſpect they combated almoſt upon equal terms.

(*sss*) But Lilburne did not always ſtate his doctrines againſt the lords in ſo exceſſive a way. The following paper, which was a propoſition ſent by Lilburne to the ſpeaker of the commons in October 1647, when he was impriſoned by order of the lords on the charge of a miſdemeanor, is a proof, that either he or thoſe

travagant doctrines, the indefatigable controvertiſt Mr. Prynne in 1647 brought forth his "Plea for the Lords or Houſe of "Peers."

thoſe about him knew how to ſhape his attack of the houſe of lords with more caution: though even this ſpecimen of Lilburne has ſtrong marks of eccentricity. The paper is given in Lilburne's life in the Biographia Britannica, and being ſo connected with the ſubject of this preface may not be unacceptable here. It is as follows:

"The propoſition of Lieutenant Colonel John Lilburne, Prerogative "Priſoner in the Tower of London, made unto the Lords and Commons "aſſembled at Weſtminſter and to the whole kingdom of England, "Oct. 2, 1647.

"I grant the houſe of lords according to the ſtatute of Edward the Third, "chap. 5. to have in law a juriſdiction for redreſſing grievances, either upon ille- "gal *delays* or illegal *judgments* given in any of the courts of Weſtminſter Hall, "*provided they have the king's particular commiſſion* therefore, and other the legal "powers contained in that ſtatute; which juriſdiction and no other ſeem to me "to be confirmed by the ſtatute of the 27th Eliz. chap. 8. and 31ſt Eliz. "chap. 1.

"But I poſitively deny, that the houſe of lords, by the known and declared "law of England, have *any* ORIGINAL JURISDICTION *over any commoner whatſoever, either for life, limb, liberty, or eſtate*, which is the only and alone thing "in controverſy betwixt them and me. And this poſition, I will in a public "aſſembly, or before both houſes, in law debate with *any forty lawyers* in England, "that are practitioners of the law; and I will be content the lords ſhall chuſe "them every man: and if after I have ſaid for myſelf what I can, *any three of "theſe forty lawyers* ſworn to deliver their judgments according to the known law "of England give it under their hands againſt me, I will give over my preſent "conteſt with the lords, and ſurrender myſelf up to the puniſhment and ſentence "of the preſent lords and commons, *provided at this debate I have ſix or ten of "my friends preſent to take in writing all that paſſes thereupon.*

"Witneſs my hand and ſeal in the preſence of divers witneſſes in the Tower "of London this 2d of October 1647."

This

"Peers." Formerly he and Lilburne had been equal ſufferers from the cruel aſperities of the ſtar-chamber court; and juſt before the beginning of the civil wars they were huzzaed as ſainted martyrs in the ſame popular cauſe (*t*). But gradually they became enliſted in oppoſite parties in the ſtate, and in almoſt every point of view completely hoſtile to each other (*u*). Prynne was ſtaunch to preſbyterianiſm, and had

This ſingular challenge, connected with Sir John Maynard's oppoſition to the juriſdiction of the lords about the ſame time, renders it probable, that there was at leaſt a current doubt amongſt lawyers, whether the juriſdiction of the lords had not been unwarrantably extended. See further the former note about Lilburne in p. 61.

(*t*) See as to Prynne Sanderſ. in his Hiſt. of Cha. 1. 338. and as to Lilburne his life in the Biographia Britannica.

(*u*) They were in declared hoſtility at leaſt as early as 1645. This appears by a letter of Lilburne to Prynne dated 7. June 1645, of which there is an account in note (P) of Lilburne's life in the Biographia Britannica. It alſo appears from Prynne's Tract intitled, "A Freſh Diſcovery of ſome Prodigious New "Wandering *Blazing Stars* and *Firebrands*;" which was publiſhed in that year. In ſection 9. Lilburne is accuſed of being the aggreſſor, by writing againſt him Prynne; more eſpecially for the perſecuting ſpirit in matters of religion exhibited in his treatiſe intitled, "Truth triumphing over Falſhood, Antiquity over No-"velty." Prynne's anſwer to the imputation of intolerance exhibits him in a moſt diſguſting way: for he glories in religious perſecution, as if it was a duty. About two years after Prynne publiſhed a long and deliberate treatiſe, again fiercely recommending religious perſecution. The very title of this latter treatiſe is tremendous. It is, "The SWORD *of* CHRISTIAN MAGISTRACY *ſupported*, "or a Full Vindication of Chriſtian Kings and Magiſtrates Authority under the "Goſpel to puniſh Idolatry, Apoſtacy, Herefy, Blaſphemy and *Obſtinate Schiſm*, with "*Pecuniary*, *Corporal*, and in ſome Caſes with *Baniſhment* and CAPITAL Puniſh-"ments." Thus the very individual, who, under the ſanction of politicks and religion, had been barbarouſly ſentenced to loſe his ears to branding of the cheeks and to perpetual impriſonment, firſt for learned and rhapſodical nonſenſe againſt plays and players and

had imbibed the harſh and ſour ſpirit of intolerance, which *then* actuated perſons of that perſuaſion both in England and Scotland: for thoſe generous ſentiments of toleration, which now ſeem to extend their influence over almoſt all religious perſuaſions amongſt us, had ſcarce begun to operate; and in thoſe times at leaſt, Roman Catholic zealots were not the only advocates for religious perſecution, and even thoſe of the church of England were far from faultleſs in that point. But Lilburne was moſt heartily devoted to the Independents; and it muſt be confeſſed, that, however ſtrange their religious fanaticiſm might be, and however dangerous and outrageous their political enthuſiaſm, this latter party ſo profeſſed and practiſed the virtue of religious tolerance, as to acquire the fame (*w*) of having firſt promulged it's mild and benevolent principles. Both Prynne and Lilburne had begun, with acting as bitter enemies to, and writing invectives againſt, not only epiſcopacy, but the king and his court: and both had been cruelly puniſhed by ſentences of a judicature, in ſome reſpect ariſtocratically compoſed, the ſtar-chamber always having had a large proportion of peers amongſt it's members. But in the reſult there was a wide ſpace between the two as to monarchy and ariſtocracy; though both continued their enmity to biſhops

and againſt Charles and his Queen on account of liberally and innocently countenancing dramatic exhibitions, and next for diſputatious and contemptible invectives about the religious ceremonials, became a heated advocate for perſecution of opinions, even to the extreme of capital puniſhment. How would ſuch a man have acted, had he been deſtined to preſide, over a court of religious inquiſition, ſuch as the inquiſitions of Portugal or Spain; or even over a mixed forum of politicks and religion, ſuch as the ſtar-chamber of whoſe tyranny himſelf had been a victim?

(*w*) See Hume's Hiſt. Engl. chap. 57.

and

and the epiſcopal form of church government. On the one hand Lilburne's principles precipitated him into the moſt democratic exceſſes; his mind being too ſlightly endowed, and too much under the dominion of religious phrenzy, to philoſophize upon republicaniſm. On the other hand, Prynne, after having long written with virulence againſt the king perſonally, and diffuſed principles ſtrongly tending to encourage even more than (x) dethronement, at length changed

(x) His writings againſt the king had been ſo violent, and ſo numerous, that when Prynne, as a leading perſon for accommodating with Charles, was arbitrarily excluded from the houſe of commons and impriſoned by the army, and it had been determined to bring Charles to a trial, Prynne's own writings were appealed to for juſtification of the then determined extremities againſt the king. The pamphlet publiſhed for this purpoſe had a very long title, expreſſive of Prynne's former accuſations of Charles. The title, which it ſeems included the principal matter of the piece, is ſtated at length in p. 1116. of Sanderſon's Life of Charles. In the beginning it is ſtiled "Mr. PRYNNE'S CHARGE againſt the "KING." After a long catalogue of imputations againſt Charles, it is expreſſed to be collected "from the Books written" by PRYNNE, and is deſcribed to be "but a very ſmall taſte from the *main Ocean* of that, which he has written con- "cerning the King and his ill behaviour ſince his coming to the Crown; as alſo "with references unto clear ſatisfactory convincing anſwers unto ſeveral objec- "tions, concerning reſiſting cenſuring and depriving kings for their tyranny, yea "capitally proceeding againſt them, *by the* SAID AUTHOR." For the proofs of the charge by Prynne againſt the king, and for Prynne's doctrine in favour of the cruel outrages then reſolved on and ſoon after acted, the reader was referred to Prynne's own writings: namely, to the third of his four parts of "The Sove- "reign Power of Parliaments," which was publiſhed in 1643, and to his "Rome's Maſter Piece," the ſecond edition of which was publiſhed in 1644. Thus Prynne, who, it muſt be confeſſed, was one of the moſt diſtinguiſhed for courage in reſiſting the outrage of the parliament's army to force the houſe of commons into the ordinance for trying the unfortunate Charles, and was ſeen courageouſly active on his behalf, was himſelf made a witneſs againſt the king; and the former writings of Prynne were reſorted to, as the beſt mode of anſwering his preſent conduct and of preparing the publick mind for the cruel extremity which ſoon followed.

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his tone: and as if both his firſt political and religious reſentments were fated, by employment in the deſtruction of his arch enemy and antient perſecutor archbiſhop Laud, whom he unrelentingly purſued even beyond the grave (*y*), and by ſeeing preſbyterianiſm triumphant over epiſcopacy and royalty ſubdued into a wretched captivity, this compound of learned combuſtibles at length pointed the exploſion of his artillery againſt religious independency and Lilburnian republicaniſm, and became violently zealous for royalty and a very bigot to ariſtocracy. It is difficult wholly to account, for this tranſition of a recent victim of ſtar-chamber perſecution, from revilings againſt the firſt Charles and his court and againſt biſhops and all the appendages of prelacy, to the love of kingſhip and the peerage. But probably a blind attachment to the rigor and ſtiffneſs of preſbyterianiſm as it was then faſhioned, and an abomination of the daring flights of independency and republicaniſm, were powerful influences over the mind of Prynne: for it was not difficult to ſee, that the preſbyterian faction was moſt likely to turn the balance of political power in their favour, by

(*y*) Prynne publiſhed no leſs than three different books in relation to the trial of archbiſhop Laud. The firſt was publiſhed in 1644 a little before the archbiſhop's execution, by the title of *A Breviate of the Life of William Laud*; and was framed out of Laud's own Diary. The ſecond was publiſhed in 1645 by the title of *New hidden Works of Darkneſs brought to Publick Light*, as an introduction to Laud's trial. The third was publiſhed in 1646 by the title of *Canterbury's Doom, or the* FIRST PART *of a Compleat Hiſtory of the Commitment Charge Trial Condemnation and Execution of William Laud.* The two latter books were publiſhed after the archbiſhop's execution, which was in January 1644-5; and though they were never compleated, yet they alone extend to almoſt 800 pages in folio cloſely printed. Such voluminous revenge after an enemy's death is perhaps without example.

uniting

uniting with the king and the lords for that purpoſe. Perhaps alſo Prynne was not ſo entirely loſt in religious and political reveries, as to be without hope, that by being a chief inſtrument in ſuch a mode of reſtoring royalty he might hide the coarſe ſtigmas of ſtar-chamber cruelty in the venerable and ſpreading robes of judicature. Indeed had king Charles returned to the exerciſe of the royal functions under ſuch an influence, it would ſcarce have been wonderful, if, inſtead of Mr. Hyde made a Lord Chancellor of England and Earl of Clarendon, we had now to look back on Mr. Prynne, exalted into judicial pre-eminence and ariſtocratical diſtinction, and conſolidated into the peerage of which he was ſo ardent a defender. But whatever might have been the cauſe of the change, it is moſt apparent, that in 1647, when Prynne firſt publiſhed his Plea for the Lords, he was become the great champion for kingſhip and the houſe of lords againſt Lilburne and every other devotee of republicaniſm; and the book is exactly ſuch as might be expected from a bigot contending to elevate what his enthuſiaſtic opponents wiſhed to deſtroy. The book is divided into two ſections.——In the firſt ſection Prynne undertakes to prove, that the Lords, though not elected by the people, but originating from creation by the Crown, have an antient and undoubted right to ſit and vote in Engliſh parliaments. Upon the ſuppoſition of a time of public tranquility, with all the parts of our Government in perfect activity, the aſſertion, which was thus propoſed by Prynne for ſolemn argument, and which it is but juſt to ſay he maintains with vaſt diſplay of learning and acuteneſs, was a truiſm. Nor even could Lilburne's untu-

tored enthuſiaſm have found a pretence to be hardy enough to deny, that under the government ſo exiſting the houſe of lords was an immemorial integral and eſſential part of an Engliſh legiſlature: and upon ſuch a caſe, all that the moſt erudite and profound friends of republicaniſm could have colorably urged muſt have been, that the exiſting government was faulty; and that the people, over whom and for whoſe benefit it was adminiſtrable, would conſult their intereſts and happineſs by changing it into a pure republic. But the caſe really exiſting, when Prynne thus advanced into the field of controverſy, was quite of another kind. A war had been long carried on between the king and the two houſes of parliament; and during that war the two houſes had aſſumed all the royal functions, and had without the king legiſlated, even to the extent, firſt of lopping off the biſhops from the houſe of lords, and next of aboliſhing epiſcopacy with all its appendages and ſubſtituting the preſbyterian form of eccleſiaſtical diſcipline and government; in other words, had ſo legiſlated, to the extent of lopping off one branch of the houſe of lords and of changing the national religion (z). The reſult of the war was, that the two houſes, or rather what remained of them, were victorious; that they held the king in impriſonment; and that they continued to carry on the government without him. When therefore Prynne firſt publiſhed his Plea for the Lords, the true iſſue between him and his opponents was, whether, with the antient government thus broken down, with a monarchy left

(z) See 9. Parl. Hiſt. 55. 356. 372. & 437. and in Scobell, ſee the ordinances of the two houſes for 12. June and 2. Aug. 1643. 3. Jan. 1644-5. 23. Aug. 1645. and 9. Oct. 1646. See alſo Huſband's Collections, 877.

in

in name only, with a houſe of lords conſiſting only of a ſmall portion of the peerage, and with a houſe of commons curtailed of almoſt half its original members, there was not a fair opening for the eſtabliſhment of a new conſtitution; and whether under ſuch circumſtances, it would not be more conſonant to the wiſhes of a majority of the people and more promiſing of happineſs to the whole ſociety, to compleat the deſtruction of the monarchy and to introduce in its place ſome form of republic; or at leaſt, whether it was not more fit and becoming to take the ſenſe of the people at large upon that point through a full repreſentation of them by a new election for the purpoſe, than to bind the people in ſo high a matter by the votes of a dwindled houſe of commons and of a mere fragment of a curtailed houſe of lords. But inſtead of meeting all theſe conſiderations; inſtead of enlarging, to evince the hazard impolicy injuſtice and cruelty of proceeding to the laſt extremity; inſtead of exhibiting the ſuperior advantages of our limited monarchy; inſtead of reaſoning, to ſhew the practicability of reconcilement with the king and his party and of ſo renovating the antient conſtitution, and to prove the vaſt preferableneſs, not only of ſo proceeding, but of ſo proceeding through the two houſes ſuch as they then exiſted; Prynne takes advantage of the unſkilfulneſs of his Lilburnian adverſaries; and conſcious, that neither a Harrington, nor a Sidney (*zz*), had interpoſed,

(*zz*) It is not meant here to refer to Harrington and Sidney, as if they were *both* partizans of the republican form of government. They were indeed both profound and manly free thinkers and free writers on government. But only Harrington was the devotee of republicaniſm; for Sidney, though ſo ſtrenuous

Prynne for the moſt part avoids the true points of the controverſy. With that view, he draws off the attention of his readers, by exhauſting them with hiſtorical proofs of the fact of the antient government, which was neither denied nor deniable. Well knowing alſo the devout prejudices, or rather the cant, of the time, he ſhelters himſelf, in a cloud of references to holy ſcripture; in the prophane aſſimilation of the infinite eternal and ſupreme omnipotence of the univerſal Creator with the fluctuating and periſhable atoms of human ſovereignty; and in preſumptuous argument from the relation between God and his creation mankind to that between the petty monarchs of the earth and their fellow creatures; with the hope, by ſuch unnatural combinations, to delude his readers into the abſurd conſideration of our kingly government and our peerage, as if they were of divine right and indefeaſible (*a*).

nuous an aſſertor of the liberty of mankind and of accountableneſs for abuſe of political power, and ſo ſucceſsful an expoſer of the pretended divinity of monarchical governments, was partial to a limited and mixed monarchy. See ſection 16. of his Diſcourſes on Government.

(*a*) The manner, in which Prynne argues from the Supreme Author of all things to human government, is to this effect. Firſt he imputes it as the doctrine of Lilburne and his followers, that election of the people is eſſential to the making of lawful kings and magiſtrates. Then Prynne anſwers this doctrine by various reaſons; and his third reaſon chiefly conſiſts in this, namely, that if the doctrine was true, it would follow, 1. that "God himſelf is no lawful king or "governor over all the world and creatures in it, becauſe not choſen or elected "by the general voice of the creatures and mankind to be king over them:" and 2. that "Jeſus Chriſt himſelf, who is a king by birthright, was not cho-"ſen by his ſaints church ſubjects and people, but chuſes them to be his lieges, "ſhall upon this account be no lawful king or governor." Theſe paſſages are from Prynne's Plea for the Lords, ed. of 1659. page 8. and 9. and there the reader will find them plentifully intermixed with references to the Old and New Teſtament.

Nor

Nor is he content with this political idolatry: for he takes every occaſion of treating popular election and popular conſent in matters of government with contemptuouſneſs (*b*).——

Having

(*b*) Lord Hale was not over democratically inclined, as his raſh cenſurer Mr. Roger North ſuppoſes; but on the contrary ſo inflexible in his attachment to the monarchical part of our conſtitution, that not only in his Hiſtory of the Pleas of the Crown, but in his unpubliſhed collections of law on the Rights of the Crown in his own hand-writing, there are paſſages, which, if they have a fault, are open to remark on that very account. Indeed both the enemies and friends of the Revolution ſeem to have been fully aware of this: for the former have appealed to the authority of his opinions againſt its principles, and the latter have thought it neceſſary to obſerve upon certain parts of his writings concerning the hereditary ſucceſſion of the crown of England. See "The Hereditary Right of the Crown of England "Aſſerted," 128. 179, & 221. and the laſt Diſcourſe in Judge Forſter's Crown Law. But whatever might be the extent of lord Hale's prejudices in this reſpect, his mind was too philoſophically expanded, not to ſee, that the conſent or agreement of the people was at leaſt a moſt deſirable ſource of political power; and that by being founded upon ſuch a baſis, government becomes guarded by the ſacredneſs of moral obligation. The following extract, from the firſt chapter of his unpubliſhed manuſcript intitled PREPARATORY NOTES TOUCHING THE RIGHTS OF THE CROWN, will, it is conceived, warrant this aſſertion.

"The right of political government may be conſidered under a double notion.—
"1. Before it is ſettled, or *in fieri*.—2. After it is ſettled, or *in facto eſſe*.

"1. Before it is ſettled.—It is clear, that no form of government, nor any "government at all, can challenge any right but by poſitive inſtitution. Man, "though he be born *ſubjicibilis* to man, yet *jure naturæ* he is ſubject to none in a "politic conſideration. It is true, the deſire to perpetuate and preſerve his own "being, and profit it by communion, inclines him to ſociety, and conſequently "to government and ſubjection as the bond. But till he ſubject himſelf he is "naturally free. Therefore much leſs can any form of government challenge a "natural right. It is true one form of government may be better in itſelf. Yet "all are but of poſitive or introduced original.

"2. After it is ſettled.—Though natural right or juſtice be not the original "of

Having thus in the firſt ſection almoſt deified the king and the peerage, and made the right of both nearly indefeaſible, Prynne, in his ſecond, moſt laboriouſly ſtrives to elevate the judicature of the houſe of lords into almoſt unbounded univerſality and ſupremacy both of appellant and other juriſdiction, excluſive of the houſe of commons and indeed except in name of the king alſo. Prynne's manner of attempting to prove this offenſive doctrine is curious. He begins with compounding the moſt full and extenſive deſcription of the judicature of *parliament* out of many moſt reſpectable books, eſpecially the writings of that coloſſus of our law lord Coke, whom Prynne like too many others is continually depreciating and at the ſame time borrowing from. Thus beginning, with attributing the judicature to the whole parliament, that is, the three component parts of king lords and commons, in a book profeſſedly written to vindicate the excluſive right of two or rather of one of them, may to plain common readers ſeem ſurprizing. But theſe are ſoon much more ſurprized. Scarce has Prynne ſo deſcribed the judicature of the whole parliament, before he gravely informs his readers, that the queſtion is, whether this ſupreme judicature of the whole parliament reſides in all of the three great component

" of any government; yet when a government is once eſtabliſhed, the ſame natural juſtice, that requires every man to keep his contract or agreement, binds " the ſociety wherein ſuch government is ſettled, and the members thereof, to obſerve that agreement whereby the government ſtands ſo ſettled."

From this extract, it appears, how widely lord Hale differed from Prynne on the principles of government. It was the wiſdom of lord Hale to render political ſubmiſſion a dignified offering of rational attachment, and the conſcientious performance of a moral duty. It was the policy of Prynne to extort ſuch ſubmiſſion as a ſervile tribute from bigoted ignorance.

parts,

parts, or in two of them jointly, or in one of them ſeparately; and having thus opened the queſtion he inſtantly and poſitively aſſerts, that the judicature of the whole reſides in the king and lords excluſive of the commons. Nor is this the ſum total of the feat Prynne performs; for after having thus profeſſed to convert three into two, he without promiſe or profeſſion, and by gradual and almoſt imperceptible undermining and management, ſo proſecutes the conjuration, as to tranſmute two into one. In plain Engliſh, Prynne commences with a flouriſhing deſcription of the judicature of king lords and commons, proceeds with excluding the commons, and finiſhes with appropriating the ſubſtantial poſſeſſion to the lords ſingly. The learned proceſs, by which the houſe of commons is thus eaſed of the ſolicitude trouble and reſponſibility of mixing in the judicature of parliament, is nearly to this effect. He ſtates and argues it as a clear and irrefragable truth, that till the latter end of the reign of Henry the third the houſe of commons did not exiſt, but our Engliſh parliament conſiſted of king and lords only: and from this aſſertion of Prynne, in his Plea for the Lords and in ſome of his prior writings, particularly in the ſecond part of his Parliamentary Writs, may be dated the commencement of the grand controverſy about the origin of the houſe of commons, which was afterwards led by that able aſſertor of the elective branch of our parliament Mr. Petyt on the one hand and by the learned but bigoted Dr. Brady on the other; for though ſome opinions of earlier date than Mr. Prynne's writings are to be gleaned from the works of former writers (*bb*), yet before his

(*bb*) See the reference to them, and the ſtatement of their ſeveral notions, in page 3. of Part II. of Prynne's very learned and curious collections on Parliamentary Writs.

diſcuſſion

diſcuſſion that ſubject had not been largely entered upon, nor minutely and formally examined in a controverſial way. Upon this famous and intereſting point as to the time and manner of the origination of our houſe of commons, lord Hale (who was peculiarly qualified by his familiarity with the records of the kingdom and his ſuperior talent of making the proper inference from them; and whoſe knowledge of our law and conſtitution is repreſented, even by the invidious and tale-bearing recorder of his failings, or rather the unjuſt reporter of them, to have been allowed on all hands the moſt profound of his time (*bbb*), but whoſe modeſty and whoſe love of truth always prevented him from obtruding raſh aſſertions where conjecture only was warrantable) appears to have conſidered the ſubject as too enveloped in obſcurity to admit of much poſitive opinion (*c*). But Prynne was not ſo nice

(*bbb*) See Mr. Roger North's Life of his brother the Lord Keeper, 63.

(*c*) Lord Hale's diffidence, on the point as to the origin of our parliament and the commencement of our houſe of commons, is very evident in the volume of his collections concerning the Prerogative, which the preſacer conſiders as being what in the liſt of lord Hale's writings in biſhop Burnet's life of him is intitled INCEPTA DE JURIBUS CORONÆ. This it is conceived will ſufficiently appear by the following extracts from that manuſcript volume, which, though for the moſt part and upon the whole in too imperfect a ſtate to bear an entire publication, contains many things of great value. Beginning with the ſubject of parliament he writes thus.

"When parliament began, or in what right or in what form, is an inquiry "impoſſible to be clearly diſcovered; partly for that the records of ſuch antiquity "are not extant; partly becauſe the hiſtory of former times never made any "preciſe diſcovery of the form or practice of them, as not ſuſpecting a change "or alteration, and therefore paſſing over the particular deſcription thereof as "impertinent.

nice and ſcrupulous; and where his paſſion and prejudice prompted, he was daſhing enough to cut the gordian knot of antiquarian entanglement he could not untie, and for that purpoſe ever ready to apply the magiſterial ſword of his dogmatical aſſertion. Thus aſſuming, he unheſitatingly takes for his logical *major* againſt all copartnerſhip of the houſe of commons in judicature of parliament, that before the latter end of our third Henry's reign the king and lords were the only conſtituent parts of the parliament of England. Next as the *minor* of his ſyllogiſm he as peremptorily inſiſts, that when the commons were admitted into our parliament, or, to uſe Mr. Prynne's own language, when the king and *lords* ſo admitted the commons, it was only to ſhare in the exerciſe of the legiſlative conſultive and tax-impoſing powers, and not in judicature: and that under this limitation the admiſſion of the commons continued ever afterwards. Upon ſuch premiſes, the inference of Prynne excluding the commons from all ſhare

" impertinent. Hence we have ſome mention of CONSILIUM MAGNATUM, " ſometimes of CONVOCATIO CLERI ET POPULI, ſometimes of CONSILIUM " MAGNUM, ſometimes of CURIA REGIS; which though they ſeem to intend " the ſame thing, yet *the different expreſſions make the thing uncertain.*"

In a ſubſequent page there is the following obſervation.

" Such have been the variety of the rights of government within this realm, " ſo many the viciſſitudes of gain and loſs between the king's prerogative and the " ſubject's liberty; ſuch are the uncertainty and obſcurity in the relations of hiſ- " torians, ſuch the brevity and darkneſs in the records extant of paſſages of antient " time, eſpecially before the beginning of Hen. 3. that we can but *gueſs*, what " was antiently the right or form of parliament. We may diſcover, that they " were not as they are now uſed: but *what they were we can but uncertainly* " *gueſs.*"

of the judicature would be irreſiſtible: for they could not have a ſhare, when they did not exiſt; and if when they were called into exiſtence, it was under the reſtriction of not mixing with the king and lords in judicature; and if that reſtriction was not afterwards yielded or waived to the commons, then the fact of our conſtitution was compleatly againſt them in this point, and the judicature continued as appropriate to the lords after the eſtabliſhment of the houſe of commons as before its birth; and if the commons ſhould be admitted into a participation of the judicature, it was to be on the ground of ſome cogent inducement to make a conceſſion in their favour. But it ſo happens, that the premiſes, upon which Prynne ſo confidently builds his proud and lofty fabric of excluſive ariſtocratical judicature, notwithſtanding all the ponderous materials ſupplied by his antiquarian learning, notwithſtanding all the piles and props of his legal architecture, do not furniſh a ſolidity of foundation correſpondent with the defiance he ſeems to bid to all contradiction. In truth every inch of his premiſes is at leaſt diſputable; and what he exhibits as the firm entire rock of conſtitution, being put to the teſt, proves to be a diverſified compoſition of very ſuſpicious materials. His boaſted *major*, that is, the non-entity of the commons in parliament before the latter end of the reign of Henry the Third, is ſo far from being a clear irrefragable fact, that ever ſince his aſſertion was firſt publiſhed, it has been the ſubject of warm and dubious controverſy amongſt perſons the moſt deeply informed; and even Lord Hale found his vaſt learning and his ſtrong diſcernment inadequate to diſperſing the darkneſs which envelops the ſubject. Nor though the commencement of county and borough repreſentation in the reign of Henry the Third ſhould be conceded, would Prynne's dogma, making the houſe of lords

lords before the forty-ninth of Henry the Third the only conſtituent part of parliament beſides the king, be a neceſſary conſequence. It would ſtill remain to prove, that the perſons ſummoned to and compoſing parliament at a more early period were a houſe of lords, in the form in which that houſe with ſome little exception was in Prynne's time and ſtill is conſtituted: that is, not as more antiently was the caſe, an aſſembly of feudal *territorial* barons, an aſſembly of barons by *tenure of lands*, but an aſſembly of *titular* barons, an aſſembly of peers poſſeſſing *perſonal* titles of honour: and it is poſſible, that on a deep inveſtigation into that point, the houſe of lords, as the peerage was conſtituted in Prynne's time and now exiſts, would appear to be ſcarce ſo antient as the time, to which Prynne thus zealouſly endeavours to poſtpone the origination of the houſe of commons. Nay, even proving the peerage to be immemorially the ſame as it now is would not quite ſubſtantiate Prynne's aſſertion: becauſe on his part it would be further requiſite to ſhew, that the houſe of lords, as it ſubſiſted before the forty-ninth of Henry the Third, was compoſed of lords or greater barons only, and not mixed with the ordinary tenants *in capite* of the crown; the contrary of which is admitted by Prynne's ſucceſſor in the argument againſt the commons Dr. Brady (*dd*), though in reſpect to monarchical government the latter was both more high flown and arbitrary and more ſteady in his notions than the former. Nor as to Prynne's *minor*, namely, the reſerve of judicature to the king and lords, when the commons were admitted into parliament with a continual uſage conformable to that reſerve, is the matter leſs conteſtable. The record of ſuch a reſerve in excluſion of the com-

(*dd*) See Introduct. to Brady's Anſwer to Petit's "Right of the Commons Aſſerted."

mons is wanting. Uſage muſt therefore be the evidence. But the antient uſage relied on by Prynne is liable to the objection of his applying that exerciſe of judicature to the houſe of lords, which, as we ſhall preſently ſee, Lord Hale and others attribute to a council of the king in parliament diſtinct from lords and commons and ſubordinate to both. It is alſo counteracted by inſtances of exerciſe of judicature by the king lords and commons concurrently. Indeed Prynne himſelf writes, as if he was conſcious of the feebleneſs of the ground, upon which he aſſerts the excluſion of the commons from all copartnerſhip with the king and lords in judicature: for in one part of his Plea for the Lords he adds as an exception, where, on the exerciſe of the extraordinary judicature of parliament by bills of attainder or bills to reverſe acts of attainder, the king and lords condeſcend to aſk, or, to uſe the proud language of Prynne, are pleaſed to *require* the concurrence of the commons; which exception he adroitly introduces to anticipate one great claſs of precedents againſt his appropriation of judicature to the king and lords; but which ſeems almoſt tantamount to ſaying, that the judicature belongs to them only except where it is exerciſed by them and the commons jointly, and conſequently of itſelf tends very much to enervate if not to deſtroy his own doctrine.——Thus ſtated, Prynne's Plea for the Lords appears a very offenſive and unwarrantable attempt, to exalt the judicature of the lords into an extravagance of latitude, and into an entire independence both of the king and commons. Upon this view alſo of the book compared with Prynne's former deeds and writings, there ariſes a ſtrange picture of verſatility changeableneſs and inconſiſtence. Some time before 1647 Prynne was noted as the individual, who had been recently puniſhed

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as the defamer of the king and court; who had been recently tortured and disfigured by a ſtar-chamber juriſdiction of a *limited* and *ſubordinate* kind; who had been a chief cauſe of extirpating that juriſdiction; who had been recently emancipated from a ſtar-chamber ſentence of perpetual impriſonment, and almoſt fainted by the guſt of popularity; who had often amplified on the rights and liberties of the people of England, and chanted upon our magna charta and the petition of right and other ſuch ſtatutes as fundamental laws of the country (*e*); who had aſſerted (*f*) the ſovereign power to be in the houſe of lords and houſe of commons CONJUNCTLY, and had vindicated them for governing without the king; and who had denied the right of the king to a negative voice in parliament, and had inſiſted on the right of the two houſes to legiſlate and to *give judgment* (*g*), not only without him in his abſence, but even againſt his conſent when he is preſent. But in 1647 we ſee the ſame Mr. Prynne, almoſt idolizing king and nobles; contemning popular voice and popular election; depreciating and degrading the houſe of commons; ſtriving to exclude them from all ſhare of judicature in parliament; endeavouring to appropriate the whole judicature of parliament to the houſe of lords; ſtruggling to avoid magna charta and other ſtatutes unfavourable to ſuch an appropriation; and ſeeking to eſtabliſh an *hereditary* ſtar-chamber with *unlimited independent*

(*e*) See Prynne's Remonſtrance againſt Ship Money, p. 3; and his Sovereign Power of Parliaments.

(*f*) See Prynne's Sovereign Power of Parliaments and Kingdoms.

(*g*) See Part II. of Prynne's Sovereign Power of Parliaments and Kingdoms, page 73.

and

and *ſupreme* juriſdiction both criminal and civil and both original and appellant; and ſo aiming to put all the juriſdictions of the kingdom, not only under the controul, but at the entire diſpoſal of an hereditary ariſtocracy. However it is not intended by theſe ſtrictures upon Mr. Prynne to deny to him his proper merits. It is neceſſary to guard, both againſt too eaſy a credence of his repreſentations of the judicature of the lords and againſt the influence of his opinions as a lawyer upon that ſubject and otherwiſe; and for that purpoſe it is fit, that his faults and blemiſhes as a writer ſhould be in ſome degree exhibited. Such precautions are more ſtrongly called for; becauſe throughout his legal writings he is continually carping at that great oracle of our law Lord Coke with a very diſguſting coarſeneſs; and it is ſometimes a faſhion to countenance Prynne in ſuch licentious diſreſpect. At the ſame time it is but juſtice to him to acknowledge, that his contributions to the elucidation of our law and hiſtory, more eſpecially in points relative to our government and conſtitution, are very numerous and important; that his laborious collections from records and other the beſt ſources are highly valuable; and that his remarks and inferences, though frequently disfigured by the ungovernableneſs of his bigotry and of his outrageous prejudices, and ever to be received with peculiar caution, evince great force of intellect, and often adminiſter vaſt aid to the moſt ſober and profound inquiry.

We now come to the Reſtoration, or rather to the more material occurrences relative to the judicature of parliament after that ſudden and ſurprizing return of the antient Engliſh government.

The

THE famous General Monk duke of Albemarle, having at firſt condemned the expulſion of the reſuſcitated long parliament, and ſo acted as to contribute to their reſumption of authority for the third time, at length under a concurrence of favourable circumſtances maneuvred that deſpiſed fragment of the houſe of commons elected for the laſt parliament of Charles the Firſt, or as it was inſultingly called the rump-parliament, into paſſing an act for ſelf-diſſolution and at the ſame time for generating a parliament in the large ſenſe of the word: the bill, which they paſſed for theſe purpoſes the laſt day of their ſitting, being not only for diſſolving the parliament which began in November 1640 and for holding a new parliament on the 25th of April 1660, but having a clauſe, which in effect declared, that the ſingle actings of this ſhrunk houſe of commons, extorted by the preſſing neceſſities of the times, were not intended in the leaſt to infringe upon the antient right of the houſe of peers to be a part of the parliament of England (*i*). In conſequence alſo of this laſt act of the *long* parliament, a new houſe of commons was aſſembled, with ſuch a confluence of royaliſts and preſbyterians, as, with the aid of the army

(*i*) Journ. Comm. 16. March 1659-60. in the afternoon. General Monk obtained the act for diſſolving the *long* parliament and calling a new one, firſt by concerting the meaſure with the preſbyterian and other members who had been ſecluded juſt before the death of Charles the Firſt, and then ſuddenly ſending a military force to ſeat them in the houſe of commons, where they conſtituted ſuch an apparent majority, that the violent members of the oppoſite party immediately quitted the houſe, and left the new comers, with the moderate members that remained, to act in their own way. See Skynner's Life of Monk 234. to 243. and Whitelock's Memorials, ed. 1732. p. 696. The reſolutions, which followed this new organization of the houſe, and ſhortly produced a new parliament with the reſtoration, are in the Journals of the Commons for the 21ſt of February 1659-60.

under

under General Monk and of the navy under Admiral Montagu, ſtifled both independency and republicaniſm, and ſo inſtantaneouſly led firſt to the formation of a houſe of lords, and next to the compleat reſtitution of the monarchy by the concurrent votes of the two houſes. The operation to this effect was in the manner ſimple: for the commons aſſembled on the day appointed by the writs of election; and on the ſame day the peers, under the encouragement of the before-mentioned acknowledgment of their antient right, and by a ſort of concert with Monk and the few others who were the mainſpring of the whole movement, met at the place they formerly occupied, and ſo, as if they had been ſeverally ſummoned, formed a houſe of lords; and then, upon invitation from both houſes, King Charles the Second returned from abroad, and placing himſelf at their head compleated the parliament, with no other objections to its regularity, than thoſe, which the imperious neceſſity of the caſe rendered unavoidable (*k*).

THUS

(*k*) The objections to the convention parliament were the defect in not ſummoning the peers, it's originally meeting without royal authority, and the *proviſional indiſſolubleneſs of the* LONG *parliament* under the famous act of Charles the Firſt, according to which it was privileged from diſſolution and prorogation except by ſtatute made for that purpoſe, and both houſes in the mean time were to be only adjournable by themſelves. Of this latter objection full advantage was taken in a pamphlet, entitled "The LONG Parliament Revived." In the title page it is dated in 1661; but it was in fact publiſhed about November in the preceding year. According to the title page it was by a Mr. THOMAS PHILIPS. But the avowed author was Mr. WILLIAM DRAKE a merchant, who had ſuffered in the cauſe of royalty. Previouſly to this pamphlet Mr. Prynne had attempted to prove the diſſolution of the *long* parliament by the death of King Charles the Firſt by whom it was called: and this pamphlet conſiſts chiefly of an anſwer to Mr.

THUS, phœnix-like, burſting from the aſhes of the finally defunct *long* parliament, what is called the *convention* and *healing* parliament of Charles the Second rapidly became as perfect, as the nature of the caſe would allow, by his preſence in the houſe of lords for the firſt time on the firſt of June 1660 (*l*).

n But

Mr. Prynne. The pamphlet gave great offence: and Drake acknowledging himſelf the author, he was impeached by the commons. But the lords, apprehending that parliament would be diſſolved too ſoon to allow of bringing the caſe to judgment, ordered the king's attorney general to proceed againſt Drake in the king's bench, and all that was done further by the lords was appointing a committee to examine him to diſcover, who were the authors and contrivers of the book. See Journ. Dom. Proc. 6. 19. & 20. Dec. 1660. & 22. Parl Hiſt. 16. & 39. The book in point of legal argument was reſpectable. But it was very ill timed, and conſidered as dangerous on account of its tendency to unſettle what had been ſo recently adjuſted by the convention parliament. There was a ſuſpicion, that the book came from ſome lawyer. However Drake was very poſitive, in taking all the reſponſibility of it to himſelf, and in aſſerting that he had no help but from Lord Coke's writings. The book is reprinted in the Appendix to vol. 23. of the Parliamentary Hiſtory. The writer of this preface is in poſſeſſion of three different anſwers to it. One is entitled "The Long Parliament twice Defunct;" a ſecond, "An-"other Word to the Purpoſe againſt the Long Parliament Revived;" and a third, "The Long Parliament is NOT Revived."

(*l*) See Journals of both houſes for that day, and 22. Parl. Hiſt. 336. Still however the judges had not joined themſelves to the lords. Therefore the lords inſtructed the lord chancellor to move the king for writs to the judges to attend the houſe as aſſiſtants. Journ. Dom. Proc. 4. June 1660. As to the epiſcopal part of the houſe of lords, it was not reſtored during the convention parliament. The office of archbiſhop and biſhop had been aboliſhed, by an ordinance of the lords and commons made the 9th of October 1646: and by the ſame ordinance the lands and poſſeſſions of the different ſees were veſted in truſtees for the uſe of the commonwealth. The ordinance is at length in Huſband's Collections 922. and begins with profeſſing to provide for the debts of the kingdom from a war, which the ordinance repreſents as mainly promoted by the epiſcopal order and

But the convention parliament, having compleatly adjuſted the reſtoration, to atchieve which it was chiefly formed, was diſſolved at the end of the ſame year: and probably one reaſon for ſo early a diſſolution was an eagerneſs, to do the utmoſt towards obviating the poſſibility of objection to their proceedings, by the confirming act of a parliament ſummoned according to all the ſanctions and forms of the antient conſtitution. Whilſt, however, the convention parliament continued, enough paſſed to ſhew, that the lords were not in the leaſt unmindful, either of the acceſſions to their judicature during the civil wars and the government by the two houſes, or of Mr. Prynne's wide aſſertion of the judicative claims of the peerage in his Plea for the Lords. Writs of error returnable in parliament would of courſe have fallen under the conuſance of the houſe of lords: for it was not likely, that writs framed immediately after the reſtoration ſhould be otherwiſe than according to the habit, which had prevailed long before the calling of the long parliament, that is, ſhould be framed otherwiſe than in effect to *commiſſionate* the lords ſingly. But it doth not appear that any writs of error were returned during the convention parliament. There was full opportunity, however, in other

and their adherents and dependants. The convention houſe of commons was very full of preſbyterians. Probably therefore it was deemed moſt prudent to poſtpone introducing the biſhops into the houſe of lords, till a houſe of commons more favourably compoſed ſhould be ſitting. Such a parliament was ſoon formed: for the convention parliament was diſſolved 29. December 1660, and the next parliament of Charles the Second firſt met 6. May 1661; and having been prorogued 30. July following it met again 20. November; and then the ſpiritual lords reſumed their ſtation in the houſe of lords; the king making a ſpeech, the firſt ſentence of which adverts to this reunion of the ſpiritual lords with the temporal peers, as an event he had long deſired, and as reſtoring parliaments to their primitive luſtre and integrity. Journ. Dom. Proc. 20. Nov. 1661.

reſpects,

reſpects, for exerciſe of judicative power by the houſe of lords; for not only ſeveral petitions of *appeal* from decrees of equity (*m*), but numerous petitions of *original* complaint (*n*) between party and party, were addreſſed to them. Nor did the lords heſitate about undertaking either ſpecies of juriſdiction. On the contrary, the lords appear, ſo far as the occaſion permitted, to have made judicial orders in as great a latitude and with as little ſcruple about the competency of their houſe, as was done between the commencement of the civil war and the ordinance for aboliſhing the monarchical and ariſtocratical branches of our government. In other words, the Journal of the lords ſhews, that throughout the convention parliament they acted, as if there was an unbounded juriſdiction inherent to the peerage, and as if the houſe of lords was a forum for all ſorts of cauſes, with no other limitation than ſuch as their own choice and moderation for the time ſhould preſcribe. So jealous alſo were the lords of the leaſt approach to copart-

(*m*) For *chancery* caſes, ſee Veale's caſe Journ. Dom. Proc. 22. June 1660. Dacre *v.* Mayo ibid. 23. July poſt meridiem 1660. Carey *v.* Cromwell ibid. 24. Aug. and 5. Dec. 1660. & Rodney *v.* Cole ibid. 4. Sept. and 20. Dec. 1660. and for *exchequer*, ſee Flanſhaw *v.* Impey ibid. 11. Dec. 1660.

(*n*) The Journal of the lords for the convention parliament is full of petitions to the houſe of lords relative to lands and offices and to other civil matters, and of orders by the lords upon ſuch petitions; and ſome of thoſe orders forbid waſte, and others change the poſſeſſion of eſtates and offices. One of the orders is on a petition claiming title to the Iſle of Mann. In the caſe of the peerage of Sandys of the Vyne a petition of claim was addreſſed to the lords, and they without waiting for a reference from the king decided for the claimant. For this latter caſe, ſee Journ. Dom. Proc. 4. May 1660. Some allowance, however, for the exceſs in the judicial orders of the lords during the convention parliament, ſhould be made in reſpect of the emergency of the time.

nerſhip in this extended judicature, that (*o*), the commons having come to ſeveral reſolutions for ſeizing the perſons and eſtates of the ſurvivors of thoſe who ſat as judges upon Charles the Firſt, and having deſired the concurrence of the lords, the latter, though Prynne the enthuſiaſtic aſſertor of their claims in their utmoſt latitude was at the head of the members ſent by the commons, objected to the votes brought up with blanks left for inſerting the lords before the commons; and at a conference between the two houſes explained the reaſon to be, that ſo joining the two houſes in thoſe votes intrenched upon the antient privileges of the lords, as having the judicature of parliament ſolely in their houſe. Nay, ſo precipitated were the lords by their eagerneſs to ſecure their claim of an excluſive judicature, that they ſingly made an order for ſecuring thoſe who ſat in judgment when Charles the Firſt was ſentenced to death, and as a ground of the order moſt incorrectly ſtated the order to proceed on a *complaint* of the commons. Had the commons imitated the raſhneſs of the lords in thus unneceſſarily ſtarting the point of judicature during the very criſis of the reſtoration, and yielded to the call of reſentment for thus unwarrantably ſtating the commons to have made a *complaint* for *deciſion*, when in truth they had propoſed to the lords a *reſolution* for *concurrence*, a fatal rupture between the two houſes might have enſued; and the newly-regenerated houſe of lords might once more have ceaſed to exiſt; and it is poſſible, that the reſtoration of monarchy might have been at leaſt poſtponed. But the convention houſe of commons had amongſt its members many perſons of great wiſdom temper

(*o*) Journ. Dom. Proc. 18. May 1660.

and

and experience; and amongſt others were lord chief juſtice Hale, then a ſergeant at law and one of the repreſentatives for Glouceſterſhire, and Mr. Heneage Finch afterwards lord chancellor Nottingham; and the conduct of the houſe of commons on this occaſion was ſuch, as might be expected from the influence and advice of ſuch perſons. The commons were not betrayed by pride into the extremity of unſeaſonable quarrel; nor, whatever aid Prynne, who was one of their own body, was tempted to give to the claim of excluſive ariſtocratic judicature, were they ſurprized by the preſſure of the moment into acquieſcence in an exceſſive pretenſion. At a conference with the lords (*p*), which was managed on the part of the commons by Mr. Anneſley afterwards Earl of Angleſey, they affectingly adverted to the diſtempers for many years and to the importance of healing meaſures: they calmly repreſented the miſtatement and irregularity of the lords in their proceedings: and they firmly *refuſed to admit the judicature of the lords ſo largely as they had aſſerted it:* but at the ſame time explaining how foreign it then was to raiſe the point of judicature, they prudently declined to engage in diſputing it at a moment ſo improper. The reſult, therefore, of an overeagerneſs on the part of the lords to eſtabliſh their claims of judicature, in the extent of the extravagant practice during the firſt nine years of the long parliament, and according to the vaſt latitude of Prynne's Plea for the Lords when their houſe verged to ſuppreſſion, was a proteſtation of the commons againſt the pretenſion of excluſive judicature, inſtead of a conceſſion in its favor. In effect it was a full

(*p*) Journ Dom. Proc. 22. May 1660.

notice

notice to the lords, that the commons did not approve the practice, into which the lords had latterly fallen, but meant to try the point of judicature with the lords at the proper ſeaſon. Nor, as events ſoon afterwards occurred and as will preſently appear, was that ſeaſon at any great diſtance.

THE ſecond parliament of king Charles the Second was aſſembled in May 1661: and it might very well be called the *ſecond long* parliament; for it had ſixteen different ſeſſions, and continued nearly eighteen years, it not being diſſolved till January 1678-9.

IT is to this ſecond parliament of king Charles the Second, that we are chiefly to look for diſputes between the two houſes about the right of parliamentary judicature.

IN January 1666-7 (*pp*), there was buſineſs before the lords, which was very near furniſhing occaſion to controverſy about judicature: for when the bill, for erecting a judicature to determine differences touching houſes deſtroyed in

(*pp*) The appellant judicial buſineſs of the lords, between May 1661 and Jan. 1666 7, appears to have been little. Their Journal only notices four writs of error, and ſix or ſeven caſes on petitions of appeal. It is obſervable alſo, that on the order of the lords in one of the appeal caſes there is a proteſt of the biſhop of Lincoln. See the caſe of Roberts *v.* Wynne, Journ. Dom. Proc. 29. Nov. 1664. The order of the lords remitted the caſe to the lord chancellor, to make a decree according to equity, though *there be not any precedent in the caſe.* The biſhop's proteſt objects to this, not only as encouraging an arbitrary power in chancery, but from a fear that the commons might conſtrue it an *extenſion of judicature* by the lords, more eſpecially as Mr. Roberts one of the parties was a member of the lower houſe.

the

the great fire of London, came from a committee of the lords (*q*), it was propoſed to annex a clauſe giving power of *appeal to the king and lords* in parliament from the ſentence of the judges. But this clauſe was rejected; and ſo all provocation to quarrel was in this inſtance avoided, though many of the lords appear to have had no wiſh of declining the challenge of diſcuſſion, twenty-nine peers deſiring leave to proteſt if the clauſe ſhould be thrown out.

HOWEVER, about the ſame time there occurred a difference between the lords and commons, which in ſome degree involved the point of judicature. The preſent Earl of Peterborough's anceſtor Lord Viſcount Mordaunt, or, as his title of Viſcount is given in Dugdale's Baronage, Lord Viſcount Avalon, having been impeached by the commons for certain miſdemeanors, the managers of the commons, when the trial came on (*r*), objected to his ſitting *within* the bar of the houſe of lords, and alſo to his having counſel. But the lords, after the report of a committee (*s*) to ſearch for precedents, reſolved both points in his favor. The commons after a conference acquieſced in the having counſel. But they ſtood (*t*) upon having Lord Mordaunt *at* the bar, in reſpect that it might intimidate the witneſſes to ſee the accuſed mixing with his peers as if he was not under trial, and that the

(*q*) Journ. Dom. Proc. 23. Jan. 1666-7.

(*r*) Ibid. 26. Jan. 1666-7.

(*s*) Ibid. 28. Jan. 1666-7.

(*t*) Ibid. 31. Jan. & 4. & 7. Feb. 1666-7.

manner

manner of a lord's appearing at his trial was ſettled in the Earl of Middleſex's caſe; and the lords after a ſecond conference not yielding, but citing the biſhop of Landaff's caſe in the 18th of James and that of the Earl of Stamford in 1645, the commons deſired a *free* conference on the matter. A free conference was accordingly granted; and at it the Earl of Angleſey and other managing lords, under an inſtruction from the houſe, reminded the commons of the parliament roll of 1. Hen. 4. as an acknowledgement by the commons themſelves, that judicature in parliament belonged ONLY *to the houſe of lords* (*u*), and thence reaſoned it as an impropriety to conteſt with them on the rule and forms of their proceeding. Upon this, Sir Robert Atkins and the other managers of the commons explained, that they were not inſtructed to diſcourſe on a point ſo unexpected as the claim by the lords of the ſole judicature of parliament. When the commons were informed of the particulars of the conference, they reſolved to deſire a further free conference with the lords, and referred it to Sir Robert Atkins and ſome others, amongſt whom was Mr. Prynne, to prepare an entry for the journal of the houſe in aſſertion of the proceeding as to the laſt free conference. But on the next day the king prorogued the parliament till the 10th of October following (*w*); and

(*u*) Journ. Dom. Proc. 7. Feb. 1666-7. But in the Journal of the commons of ſame day their managers ſtate the lords to have inſiſted that judicature was only in the KING *and lords*, and that on that point they might deny the commons a conference.

(*w*) An extraordinary circumſtance occurred before the day to which the parliament was thus prorogued. The Dutch fleet having entered the river Medway and

and ſo both the impeachment of Lord Mordaunt and the quarrel about the form of proceeding and about the incidental point of judicature terminated, and as to the impeachment itſelf it was never reſumed.

In the ſeſſion of parliament, which commenced 10. October 1667, there ſoon aroſe a difference between the two houſes, on a meſſage from the commons to the lords impeaching the famous Earl of Clarendon of treaſon and other crimes generally, and deſiring to have him committed; the lords declining to commit till the articles were (*x*) exhibited, and after a *free* conference reſolving againſt it. But Lord Clarendon's going abroad changed the impeachment into a bill for baniſhing (*xx*). Nor doth anything relative to the point of the claim of ſole

and deſtroyed ſeveral king's ſhips, there was a great alarm; and the king was induced to convene parliament *before the day of prorogation*. But the two houſes ſat only a few days; and the parliament was again prorogued to the 10th of October. Lord Clarendon, then upon the verge of being driven out of office, thought convening parliament before a day of prorogation clearly illegal, though on adjournment he admitted it to be otherwiſe. He ſtates Prynne's being carried *privately* to ſatisfy the king, that on an emergency he had power. Lord Clarendon adds, that Prynne's *judgment, which in all other caſes* the king *did enough undervalue, very much confirmed him in what he had very much a mind to*. Clarend. Contin. 8vo. ed. vol. 3. p. 800.

(*x*) Journ. Dom. Proc. 12. 13. 14. 19. 20. 21. 22. & 29. Nov. & 2. Dec. 1667. See further 1. Grey's Deb. 6.

(*xx*) When this bill paſſed the lords, a very ſtrong and able proteſt againſt it was entered by the Earl of Strafford; and in this proteſt it is obſervable, that the *houſe of lords* is ſtiled the HIGHEST *court of judicature in the kingdom*. Journ. Dom. Proc. 12. Dec. 1667. There was a proteſt alſo by lord Holles and other lords.

judicature by the lords appear, except that one reaſon, in a proteſt of the Earls of Bridgewater and Angleſey and Lord Chandos againſt granting a *free* conference to the commons, objects to ſuch a conference, that JUDICATURE *is* ENTIRELY *with the Lords*, and therefore that it is their office to give the rule *(y)*.

ANOTHER

(y) About the ſame time with the proceeding againſt Lord Clarendon, a committee of the houſe of commons had been appointed to inquire into ſome information the houſe had received of innovations in trials for life and death and of reſtraints put upon juries. Journ. Dom. Proc. 16. 21. & 31. Oct. & 7. 11. 12. 15 & 18. Nov. & 3. & 7. Dec. 1667. This committee (amongſt whom were Mr. Vaughan afterwards the lord chief juſtice of that name, Sir Robert Atkins afterwards firſt lord chief juſtice of the common pleas and then lord chief baron, Mr. Solicitor General Finch afterwards lord chancellor Nottingham, and Mr. Prynne) made a long report touching reſtraints upon juries, particularly by lord chief Juſtice Keeling in ſeveral cauſes. The report concluded with ſeveral reſolutions againſt him, namely, that the proceedings of the chief juſtice in the caſes reported were innovations in the trials of men for their lives and liberties; that he had uſed an arbitrary illegal power, which was of dangerous conſequence to the lives and liberties of the people of England, and tended to introducing an arbitrary government; that in the place of judicature the chief juſtice had undervalued vilified and contemned *magna charta*; and that he ought to be brought to condign puniſhment. Ibid. 11. Dec. 1667. The debate upon this report is in 1. Grey's Deb. 62. & 63. and there it appears, that the chief facts imputed to him were fining grand juries for not finding according to his direction, threatening petty juries into verdicts, and calling *magna charta* when cited to him *magna farta*. He was heard in his defence againſt the report. His defence as to fining juries was, that the judges held them finable for not doing their duty; and that he had only fined where there was actual miſbehavior. As to *magna charta*, he ſaid, he did not remember his words; but that whatever his words were, they were in anſwer to ſome impertinent citation of *magna charta* and not in ſcorn of it: and that if he did uſe the words imputed, he confeſſed it's being improper. This defence was ſo ſucceſsful, that the houſe immediately reſolved to proceed no further againſt him. But they previouſly reſolved, "that the practice of fining or impriſoning of jurors "is illegal," and they immediately afterwards ordered in a bill to declare to that effect.

ANOTHER caſe, in which judicature as between the two houſes became the ſubject of conſideration, occurred ſoon after the impeachment of Lord Clarendon. It aroſe on petition to the commons from a Mr. Fitton, complaining of ſome exerciſe of juriſdiction by the lords (z): and on a report of the caſe from a committee that the matter of juriſdiction was fit to be argued at the bar of the houſe of commons, the houſe appointed a day to hear it accordingly, and at the ſame time appointed a committee to inquire into precedents in caſes of a like kind; and amongſt the committee were named, Sollicitor General Finch afterwards lord chancellor Nottingham, Mr. Serjeant Maynard, Mr. Vaughan afterwards lord chief juſtice, and Mr. Prynne; and the three latter were deſired to take ſpecial care in the buſineſs. What was the preciſe nature of this caſe of Mr. Fitton, is not ſtated in the journal of the commons or in the printed account of the debate. But from various entries in the journal of the lords the ſubſtance of the caſe appears on the whole to have been to this effect. Mr. Fitton and three others had been

effect. See Journ. Dom. Proc. 13. Dec. 1667. & 1. Grey's Deb. 67. Upon this bill there was much proceeding; but it never paſſed into a law. However ſoon after this attack of lord chief juſtice Keeling, the famous *habeas corpus* caſe of Buſhell, who with eleven other jurors was fined at the Old Bailey for acquitting two priſoners *againſt evidence* and *the direction of the court in matter of law*, produced a deciſion of the court of common pleas againſt the legality of ſo fining jurors, with ſuch a profound and elaborate argument from lord chief juſtice Vaughan on delivering the court's opinion, as operated in a way equivalent to a declaratory law. See Vaughan's Reports 135. to 158. and the arguments of counſel in Buſhell's cauſe in 1. Freem. 135. See further 2. Hal. Hiſt. Pl. C. 158. to 161. and the able notes of Mr. Emlyn the learned editor.

(z) 12. Dec. 1667. Journ. Comm. 21. & 22. Feb. & 3. March 1667-8. 1. Grey's Debates 90. & 100.

formerly proceeded againſt before the lords for contriving and publiſhing a libel upon Lord Gerard of Brandon; and the lords in July 1663 (a) had ſentenced Fitton in a fine of £500. to impriſonment in the king's bench priſon till he ſhould produce Abraham Granger whoſe name was to the libel, and to find ſecurities for good behavior during life, with direction to the chief juſtice of the king's bench to take ſuch ſecurities. Under this ſentence in a caſe at leaſt mixed with privilege, Fitton, notwithſtanding a prorogation of parliament, which confeſſedly terminates impriſonment by the houſe of commons in privilege caſes, ſtill continued in priſon; and one William Carr, on his owning the ſame libel and his having diſperſed it, had been recently adjudged by the lords (b) to pay a fine of £1000. and to impriſonment in the Fleet during the king's pleaſure and to the pillory. Being both thus impriſoned by the lords, Fitton and Carr reſorted by ſeveral petitions to the commons (c) for relief. A committee was appointed upon Carr's petition as well as upon Fitton's. However no report appears to have been ever made upon the petition of Carr, and what became of his caſe is not mentioned, except that three years afterwards he publiſhed a relation of it and of his ſufferings with a plea againſt the juriſdiction of the houſe of lords. But Fitton's petition was reported upon as fit for ſolemn argument at the bar of the houſe of commons as to the juriſdiction of the houſe of lords, and was ordered to be argued accordingly in the manner before

(a) Journ. Dom. Proc. 27. June, & 9. & 15. July 1663.

(b) Journ. Dom. Proc. 15. 18. & 19. Dec. 1667.

(c) For Fitton's Petition ſee Journ. Comm. 12. Dec. 1667. & for Carr's ſee Ibid. 17. Dec. 1667. 21. Feb. & 16. March 1667-8.

mentioned.

mentioned. It appears alſo, that the caſe was argued at the bar of the commons (*d*) by Fitton's counſel Mr. Offley, who ſaid ſome ſtrong things againſt the juriſdiction of the lords, but is reproached with having ſo cloſely borrowed from a prior argument of the Sollicitor General Finch afterwards lord chancellor Nottingham at the bar of the lords, though in what caſe is not mentioned, as to have induced the latter to leave the commons. When the argument was over, the debate was adjourned for a week. But the journal of the commons is ſilent as to any further proceeding upon the caſe. Probably this caſe became abſorbed in the conſideration of the great caſe, which almoſt immediately followed, and brought the two houſes to a direct iſſue on one great branch of the juriſdiction claimed by the lords but denied by the commons: or perhaps the commons thought this caſe of Fitton and that of Carr too much mixed with contempt and breach of privilege to be convenient caſes to make their ſtand upon. However theſe two caſes ſhould not be forgotten. Either they were caſes of breach of privilege and contempt, or they were not. If they were, the continuance of impriſonment after the prorogation of parliament, the fining, and every other part of the ſentence in both caſes, became diſputable: for it may be aſked, how on breach of privilege are the lords warranted to do more than can be done by the commons in a like caſe? on the other hand, if they were not caſes of privilege and contempt, then the proceedings of the lords againſt Fitton and Carr were open to the objection of an exerciſe by the lords of an *original* juriſdiction over crime, of having adjudged a commoner for miſdemeanor

(*d*) Journ. Comm. 3 March 1667-8. & 1. Grey's Deb. 101.

without

without impeachment of the commons or the verdict of jury, and of having ſo expreſſed the impriſonment part of their ſentence in both caſes as to make it impriſonment *for life*, that is, in Fitton's unleſs they ſhould interpoſe to declare it terminated, and in Carr's unleſs the king ſhould pleaſe to determine it. To ſome of theſe objections Mr. Offley did in effect advert in arguing Fitton's caſe. In remarking alſo upon the conſequence of ſuch an exerciſe of criminal juriſdiction by the peers, he pointedly ſaid, *the juriſdiction of the ſtar-chamber is now transformed into the houſe of lords, but ſomewhat in a nobler way.* It did not occur to him to add, that the juriſdiction of the ſtar-chamber, though juſtly odious both for the mode of trial and the exceſſive puniſhments it had inflicted, and therefore wiſely aboliſhed, was in ſome degree ſanctioned by the ſtatutes of the realm: but that it remained to explain, how the houſe of lords had obtained the like or any other ſufficient ſanction for exerciſing the ſame juriſdiction; and how it could be proper to tolerate that in an hereditary kind of ſtar-chamber, without the ſanction of ſtatute and without any other limitation than ſuch as their own moderation ſhould preſcribe, which the Legiſlature had ſo indignantly aboliſhed, in the caſe of a court ſanctioned by ſtatute and not pretending to adjudge crime of a higher order than miſdemeanor.

BUT though theſe two caſes of Fitton and of Carr, which probably are the earlieſt inſtances to be met with of direct petitions of complaint to the commons againſt the lords for exceſſive aſſumption of judicature by the latter, did not of themſelves bring the two houſes into actual quarrel with each other: yet there paſſed enough from the commons to ſhew, that they were nearly ripe for ſerious conteſt on that head; and that as Fitton's

Fitton's caſe had already provoked them to appoint a committee to conſider of the exerciſe of juriſdiction by the lords in all caſes of the kind, and ſuch committee was ſtill exiſting, ſo very little of additional matter was requiſite to excite the commons into direct hoſtility.

In truth, at the very moment the commons adjourned the debate on Fitton's caſe after hearing his counſel, another caſe much better adapted to putting the original juriſdiction claimed by the lords to a teſt, becauſe wholly unmixed with privilege, was in embryo; and ſo advanced was it in it's progreſs to matureneſs for the commons, that it reached them in proper form about ſix weeks afterwards.

This other caſe was the famous one of Mr. Thomas *Skinner* merchant againſt the *Eaſt India Company*. Upon the preſent occaſion it is fit, that the nature of this caſe and of the proceedings upon it ſhould be well underſtood; for it involved a number of great points relative to the judicature of the houſe of peers. It directly involved the queſtion, whether by our law and conſtitution the houſe of peers inherently and in right of their order is inveſted with *original* juriſdiction over *civil* cauſes between party and party; the queſtion, whether the king, by recommendation of a buſineſs to the peers, or by any other ſpecies of *royal delegation*, could ſupply any defect which in this reſpect there might be in their power; and whether the houſe of peers could *without a jury aſſeſs damages*; and whether alſo it was competent to the lords to impoſe *fines* for breach of privilege, and to award impriſonment till payment. Collaterally and incidentally, the caſe involved the pretenſion of the

the houſe of lords ſingly to an *original* juriſdiction over *crimes* unconnected with the privileges of the peerage, or rather the whole compaſs of their judicative powers. But ſtating the caſe properly is not quite ſo eaſy, as may be expected: becauſe the printed journals both of lords and commons, for a reaſon which will be preſently explained, are almoſt a blank as to the proceedings of the two houſes upon this caſe. However there are ſources (*e*) ſufficient to ſupply this chaſm of the printed journals; and from thoſe ſources, aided by the printed parliamentary debates, particularly thoſe by Mr. Grey, who was a member of the commons at the time, it ſhall be attempted to relate the caſe from beginning to end.

(*e*) A book printed in 1669 and intitled "The Grand Queſtion concerning "the Judicature of the Houſe of Peers Stated and Argued," or "The Juriſ-"diction of the Houſe of Peers Aſſerted," ſupplies much of the ſuppreſſion in the printed journal of the lords. The ſuppreſſion in the printed journal of the commons is almoſt wholly ſupplied in a valuable modern work on the Proceedings of the Houſe of Commons by a gentleman eminent both for official experience and for official ability.——The book, intitled "The Grand Queſtion," was proved before the commons to have been printed by the order and direction of the famous Denzill lord Holles, as will be preſently ſhewn. He is alſo generally conſidered as the author. See 3. Grey's Deb. 246. and Sir Robert Atkyns's Treatiſe on the Juriſdiction of the Houſe of Peers 1. But the argumentative part of the book conſiſts chiefly of reaſons and precedents, uſed for and againſt the juriſdiction of the lords, more eſpecially thoſe for their juriſdiction, at conferences between the two houſes in Skinner's caſe. This part, which is confeſſedly extracted from entries in the journal of the houſe of lords, was probably the work, not wholly of lord Holles, but of him with the aſſiſtance of two or three other peers. If he had any ſuch aſſiſtance, no perſons were more likely to give it, than the Earls of Angleſey and Shafteſbury, of whom both were ſtrenuous aſſertors of the juriſdiction and privileges of the peers.

THE

THE origin of Skinner's caſe (*f*) was a petition preſented by him to king Charles the Second ſoon after the reſtoration. According to the ſtatement ſigned by the counſel of Skinner there was a general liberty of trade to the Eaſt Indies in 1657, and he in that year ſent a trading ſhip there; but the company's agents at Bantam, under pretence of a debt due to the Engliſh Eaſt India Company, ſeized his ſhip and goods, aſſaulted him in his warehouſe at Jamba in the iſland of Sumatra, and diſpoſſeſſed him of a little iſland called Barella. In reſpect of theſe injuries, he ſoon after the reſtoration prayed the king to appoint a court of high conſtable and earl marſhal to hear and determine the matter as not being remediable by the ordinary courſe of law, or to put it into any other way for juſt relief. After various ſolicitations, the king by an order of council dated in March 1665-6 referred it to the archbiſhop of Canterbury the lord chancellor the lord privy ſeal and lord Aſhley, to ſend to the governor and ſome of the members of the Eaſt India Company, to treat with them, and to induce them to give a reaſonable ſatisfaction to Skinner. Under this reference Skinner gave in a written ſtatement of his caſe ſigned by his counſel; and eſtimated his loſs at about £3300. and upon that ſum he claimed intereſt for ſix years; and beſides this, he claimed damages, which he rated at more than the other part of his demand, but which he ſubmitted to the diſcretion of referees. To this caſe the Company gave in a defenſive anſwer, but concluded it with an offer to pay £1500. upon having Skinner's releaſe in full. Skinner replied to this anſwer, and

(*f*) The Grand Queſtion concerning the Judicature of the Peers, 1. to 44.

concluded, with ſubmitting the amount of his demand to the deciſion of the referees, and with a hope that he ſhould have his iſland reſtored to him. After hearing counſel on both ſides, the referees on the 6th of December 1666 reported, that they found Skinner to have ſuffered much wrong from the Company or their agents, and therefore had endeavoured to perſuade the company to give ſatisfaction; but that, in reſpect of the great difference between Skinner's demands and the Company's offer, the mediation of the referees had proved ineffectual. To this the referees added, that as to the iſland of Parella in the Eaſt Indies, they conceived Skinner ought to enjoy it, and to trade from thence into any part of the world except England. Upon this report of the referees, the king was induced on the 19th of January 1666-7 to ſend a meſſage on the buſineſs to the houſe of lords, recommending it to them to do juſtice to Skinner according to the merits of his cauſe; and all the proceedings in council were tranſmitted to the lords; and Skinner alſo preſented to them a petition ſetting forth the wrongs done to him by the Eaſt India Company; but whether the recommendation or the petition preceded, is not quite clearly ſtated. Being thus poſſeſſed of the caſe, the houſe of lords ordered a copy of Skinner's petition to be given to the Company, and that they ſhould anſwer it. For anſwer, the Company gave in a plea to the juriſdiction, namely, after proteſting againſt the truth of the injuries ſuppoſed, *that the petition is in the nature of an* ORIGINAL *complaint, not brought by way of appeal bill of review or writ of error,* NOR INTERMIXED WITH PRIVILEGE OF PARLIAMENT, *nor having reference to any judgement.* In addition alſo to this plea, they pleaded over and ſaid, *that the Company was incorporated by*

ſeveral

ſeveral charters in the reigns of Elizabeth and king James, and likewiſe by a charter from Oliver, which excluded all others not members of the corporation from trading in any part of the Eaſt Indies within the limits of the ſaid charters, and that therefore if any ſuch injuries were done, it was by virtue of the charters, and that whether criminal or civil they were for ever releaſed and diſcharged by the act of oblivion. Upon this plea the lords ordered the counſel on both ſides to be heard on the 24th of January 1666-7. However ſuch poſtponements occurred, that the ſeſſion ended without a hearing. But parliament meeting again in the October following, Skinner preſented a new petition to the houſe of lords; and the Company pleaded as before; adding, that the matters of complaint in the petition were ſuch as to be remediable in the courts of Weſtminſter Hall, and that in them the Company had a right to be tried, and that they ought not to be brought before the lords *per ſaltum*. In this ſtate of the buſineſs the lords in December 1667 referred it to all the judges, to conſider whether the caſe of Skinner was relievable in law or in equity, and if ſo in what manner. Upon this reference, the chief juſtice of the king's bench reported all the judges to be of opinion, *that the matters, touching the taking away the petitioner's ſhip and goods and aſſaulting his perſon,* NOTWITHSTANDING THE SAME WERE DONE BEYOND THE SEAS, *might be determined in his Majeſty's ordinary courts at Weſtminſter; and as to the diſpoſſeſſing him of his houſe and iſland, that he was not relievable in any ordinary court of law.* After this report the lords ordered the cauſe to be heard, and having ſpent ſeveral days in hearing both ſides, they appointed a day for conſidering the cauſe; and upon the day appointed, they after

ſolemn debate reſolved to *relieve* Skinner, and referred it to a committee to conſider what *damages* he had ſuſtained and what recompence was fit to be given to him. Upon report alſo of the committee, the lords *adjudged the Eaſt India Company to pay £5000. to Skinner*. But between the order of reference and the report, the Eaſt India Company took refuge with the houſe of commons by preſenting a petition to them. In it the Company ſtated the hearing by the lords notwithſtanding the plea to their juriſdiction; and that the lords had denied to the Company both a commiſſion to examine witneſſes abroad and time to ſend for their witneſſes home. The petition alſo ſtated, that the lords had appointed a *committee to aſſeſs damages* againſt the Company; that the committee was proceeding accordingly; and that ſeveral members of the Company were members of the houſe of commons. The petition concluded, with ſubmitting that the proceedings of the lords were *againſt the laws and ſtatutes of the nation, and the cuſtom of parliament*; and with praying that the houſe of commons would interpoſe with the lords for relief of the petitioners. This petition raiſed a flame in both houſes.——The commons (*g*), upon reading it, and upon its being owned by the Company's deputy governor Sir Samuel Barnadiſton and others, ordered the committee recently appointed in reſpect to the juriſdiction of the lords in the caſe of Mr. Fitton and in ſimilar caſes, to conſider this caſe alſo in point of grievance and extent of juriſdiction; and particularly recommended the diſpatch of it to Mr. Solicitor General Finch and all the gentlemen of the long robe. From this committee there ſoon came a report, with three

(*g*) 17. April 1668. See 3. Hatſell's Prec. of Proceed. of Comm. 179.

ſtrong

ſtrong reſolutions (*h*) againſt the juriſdiction and proceedings of the lords. On a ſubſequent day (*i*) the commons committed Skinner for a breach of privilege. The day after the buſineſs was debated in the commons both in the forenoon and afternoon. As far as we can judge from the exiſting ſhort notes of the debate (*ii*) Mr. Solicitor Finch, Mr. Serjeant Maynard,

(*h*) The firſt of the committee's reſolutions ſtated the proceedings of the lords to be a breach of the privilege of the commons, in reſpect that ſeveral of their members were members of the Eaſt India Company. The ſubſtance of the ſecond was, that aſſuming and exerciſing juriſdiction by the lords over the caſe, and their *overruling of the plea of juriſdiction*, the cauſe coming on before them *originally only*, and the matter complained of by Skinner concerning taking his ſhip and goods and aſſaulting his perſon being relievable in the ordinary courts of law, *were contrary to the law of the land*, and tended to the depriving of the ſubject of the benefit of the known law, and introducing arbitrary power. The third was, that *allowance* by the lords of *affidavits* before maſters in chancery and a judge of the admiralty as *proofs*, with their *not granting a commiſſion to examine witneſſes*, was illegal.

(*i*) 1. May 1668. See 3. Hatſell's Prec. of Proceed. of Comm. 179.

(*ii*) The following paſſages are ſelected from Mr. Grey's account of the debate:

Mr. Serjeant Maynard. "The judges opinion to the lords was, that "Skinner is relievable by the courts in Weſtminſter for his ſhip and goods; but "that the taking away his houſe and iſland in the kingdom of Jamba and diſpoſ- "ſeſſing him of them is not. The ſhip and goods belonging to his perſon, and ſo "relievable at law in the court at Weſtminſter. But the lords have paſſed "judgment upon the *whole* matter."

Mr. Vaughan. "No court under the king can have juriſdiction, where the "king himſelf has none."—"Juriſdiction of the perſon of his ſubject the king "can

Maynard, Sir Robert Atkins, Sir Robert Howard, Sir Robert Thurland, afterwards a baron of the exchequer, Mr. Vaughan, afterwards

" can have in a foreign place, and no otherwiſe. 13. R. 2. Sir Thomas Coggan's " caſe. *Coram rege et* CONCILIO, not *coram* BARONIBUS."

MR. PRYNNE. " Think, that the lords have clear juriſdiction in both caſes, " and not the courts of Weſtminſter. Always at the opening of parliaments, " petitions were received by the lords, and all grievances both foreign and at " home. Treaſon committed beyond ſea till 25. Hen. 8. was triable at Weſt- " minſter. *Intra quatuor maria* is the kingdom of England only." — " It was a " device in king James's time, the bringing an action in *Japan* in *Cheapſide*, and " ſo of other places." — " The lords have this juriſdiction and no court elſe. " The lords in *mesne & tunn* refer things to the common law. All things were " referred to the triers of petitions, and ſo were ſent to the ſeveral courts for re- " medy. But *where no remedy could be had by the courts, they were reported to* " PARLIAMENT *for remedy.*"

SIR ROBERT HOWARD. " It is no argument, that becauſe the lords have " fined in ſome things, they may do it in every thing. The lords may be ſo " raiſed in point of their judicature, that at laſt all cauſes will be brought origi- " nally, if you ſuffer this."

MR. SOLICITOR FINCH. " Let the cauſe be relievable in any court " either at Weſtminſter or the court of admiralty, *but not originally at the lords* " *bar:* becauſe at the other courts the cauſe has all its concoctions, and comes " thither for reviſion. It can have no reviſion from thence, but by a miracle, " the legiſlative way. The lords cannot create a power. *Durum fuit, quod non* " *habuit remedium*, in caſe of dower before the ſtatute of Weſtminſter, but by " legiſlative power. God forbid, there ſhould be any caſe but the lawyers may " tell a remedy for, either in the courts of Weſtminſter Hall or legiſlatively. " Believe it, *the lords have no power to give remedy where the law gives none,* " *unleſs the commons have a ſhare in that remedy.*"

Sir

afterwards lord chief juſtice of the common pleas, Sir John Northcote, and the poet Waller, were the ſpeakers againſt the juriſdiction of the lords; and the only advocate for it was Mr. Prynne, who appears to have been zealouſly anſwered by Mr. Solicitor Finch. The debate was concluded with three reſolutions of the (*k*) commons. The firſt condemned the proceedings of the lords on Skinner's petition as taking cognizance *originally* of a *common plea*. The ſecond condemned their taking cognizance of the right to the iſland and *giving damages*. The third declared the proceedings of Skinner a breach of privilege (*l*).——On the part of the lords there was an

SIR EDWARD THURLAND. "8. Edward I. The lords are bound by *magna* "*charta*, as well as any other courts. *Per ſacramentum ſuum* is by jury, and "in thoſe proceedings of the lords none of that is done. The lords give dama- "ges. That is expreſſly againſt it, and it ought to be by jury. The lords in "ſome caſes may fine; but here are damages given. The jury may be at- "tainted for damages. But from the lords no appeal or remedy. Would have "ſome healing way propoſed; but yet to aſſert our liberty by declaring, that the "lords have no power in this *originally*."

MR. WALLER. "Doth not know how long the lords have had the title of "ſupreme court of juſtice. We judge with them. They ſent us down a "bill to judge the illegitimacy of Lady Roos's children the laſt ſeſſion. We "judge with them in all legiſlative caſes. Therefore they are not ſupreme, unleſs "appeal be made to them, as to Philip waking and Philip ſleeping."

(*k*) 1. Grey's Deb. 150.

(*l*) The firſt and ſecond of the reſolutions were in the words following.

"That the lords taking cognizance of, and their proceeding upon the matter "ſet forth and conſidered in the petition of Thomas Skinner merchant againſt the "governor

an equal ſhare of activity and warmth. It appearing that copies of the Eaſt India Company's petition to the houſe of commons were current (*m*), the houſe of lords voted it a *ſcandalous libel* againſt them; and then having given their final judgment, that the Company ſhould pay £5000. to Skinner, they next referred it to their committee for privileges to examine who was the publiſher of the petition.——The other proceedings of the two houſes in this caſe of Skinner and the Eaſt India Company were to this effect. The commons deſired (*n*) a conference with the lords; and it being granted the lords were informed of the votes of the commons, and of the

" governor and company of merchants trading to the Eaſt Indies, concerning the " taking away the petitioner's ſhip and goods and aſſaulting his perſon, and their " lordſhips overruling the plea of the ſaid governor and company, the ſaid cauſe " coming before that houſe ORIGINALLY only upon the complaint of the ſaid " Skinner, being a *common plea*, is not agreeable to the laws of the land, and " tends to deprive the ſubject of his right eaſe and benefit due to him by the ſaid " laws.

" That the lords taking cognizance of the right and *title of the iſland* in the " petition mentioned, and GIVING DAMAGES thereupon againſt the ſaid gover- " nor and company, is not warranted by the laws of this kingdom."

The great difference between the reſolutions of the committee of the commons and thoſe of the houſe is, that the latter do not charge the lords with *admitting affidavits as proofs* or with refuſing to grant a *commiſſion for examining witneſſes abroad.*

(*m*) Grand Queſtion 38. & 47. and Journ. Dom. Proc. 29. April. and 1. & 2. May 1668.

(*n*) 4. 5. & 8. May 1668.

reaſons

reaſons of them (*nn*). Then the lords came to two reſolutions. One declared the proceedings of the commons upon the petition of the Eaſt India Company a breach of the privileges of the houſe of peers. The other declared the proceedings of the lords in taking cognizance of Skinner's petition overruling the plea of the Company, and adjudging £5000. damages againſt them, to be agreeable to law (*o*). Theſe reſolutions were immediately communicated by the lords to the commons

(*nn*) Mr. Serjeant Maynard's ſpeech as one of the managers for the commons is given at length in 1. Grey's Debates 445. But he profeſſedly inſiſts chiefly on acts of parliament and the common law. He noticed, that the citing of precedents was committed to another hand. Who the other member was, doth not appear. But of the precedents cited for the commons, there is ſome account, taken as it ſeems from entries in the original journal of the lords, in the Grand Queſtion concerning the Judicature of the Houſe of Peers, ſee page 55 to 60. The ſame book alſo contains ſome account of the argument for the commons in other reſpects.

(*o*) Theſe two reſolutions were as follow:

"That the houſe of commons entertaining the ſcandalous petition of the Eaſt "India company againſt the lords houſe of parliament, and their proceedings ex- "aminations and votes thereupon had and made, are a breach of the privileges of "the houſe of peers, and contrary to the fair correſpondency which ought to be "between the two houſes of parliament, and unexampled in former times.

"That the houſe of peers taking cognizance of the cauſe of Thomas Skinner "merchant, a perſon highly oppreſſed and injured in Eaſt India by the governor "and company of merchants of London trading thither, and overruling the plea "of the ſaid company, and adjudging £5000. damages thereupon againſt the ſaid "governor and company, is agreeable to the laws of the land and well warranted "by the law and cuſtom of parliament, and juſtified by many parliamentary pre- "cedents antient and modern."

at a conference desired (*oo*) for that purpose. It seems, that at this second conference the lords entered into a large consideration of the reasons and precedents (*p*) for their jurisdiction; and that in that respect they fully availed themselves of Mr. Prynne's Plea for the Lords, that book, though not avowedly relied upon, appearing to have been the chief source of the matter produced on behalf of the lords and against the commons. But these conferences between the two houses did not induce either of them to yield an iota of its original resolutions, or in any degree conciliate matters. On the contrary, new heats were generated. The commons, on the report from their managers of the votes of the lords, immediately (*q*) voted negative resolutions, namely, that the petition of the East India Company to the commons was not scandalous, and that the delivery of it to them and their proceedings upon it were no breach of the privilege or encroachment upon the jurisdiction of the house of lords. On the very next day (*r*) also, when both houses were on the point of an adjournment by order of the king, the commons resolved, that whoever should be aiding, in execution of the order of the lords in the case of Skinner against the East India Company, should be deemed a betrayer of the rights

(*oo*) Journ. Dom. Proc. 8. May 1668 and same day post meridiem.

(*p*) See a full account of them in the Grand Question concerning the Judicature of the House of Peers, p. 60 to 188. See also a speech of the second Villiers Duke of Buckingham in 1. Chandler's Deb. Comm. 123.

(*q*) 8. May 1668. See 3. Hatsell's Prec. of Proceed. of Comm. 189.

(*r*) 9. May 1668. See ibid.

and

and liberties of the commons of England and an infringer of the privileges of the houſe of commons: and this with the reſolutions of the preceding day was inſtantly ſent to the houſe of lords (*s*). Nor were the lords leſs prompt in their anger. Before their laſt conference with the commons, the lords (*y*) had gone great lengths. They had ordered, that except one tax bill before them, no other buſineſs ſhould be done till the privileges of their houſe were fully vindicated and ſettled, and that their committee for privileges ſhould ſit preſently: and expecting an order from the king for immediate adjournment, they had moved him to defer it for a few days, in regard that their rights and privileges had been diſputed by the commons, and in order to have time to vindicate thoſe rights and privileges. When alſo the king had conſented to give a few days, with an explanation that he looked upon it as a thing wherein he was much concerned, the lords were active enough, not only to perform the buſineſs of the ſecond conference with the commons, but afterwards ſo to expedite a proceeding againſt Sir Samuel Barnadiſton the deputy governor of the Eaſt India Company, for a breach of their privilege in promoting the petition againſt their judgment for Skinner, as before the adjournment, though not time enough for notice by the commons, to ſentence Sir Samuel in a fine of £300. with direction that he ſhould remain a priſoner in the cuſtody of the black rod till payment.

(*s*) Journ. Dom. Proc. 9. May 1669.

(*y*) Journ. Dom. Proc. 4. 5. 6. 7. 8. & 9. May 1669.

WHEN the quarrel had proceeded to theſe extremities, of all of which Mr. Prynne, on the exceſs of whoſe ariſtocratical principles the lords ſeem throughout to have acted, lived to be a witneſs, both houſes, in purſuance of an order from the king, adjourned themſelves for three months. But a much longer time paſſed before their meeting to tranſact buſineſs: for two other adjournments followed by order of the king, and then by a prorogation their meeting was poſtponed till the 19th of October 1669. However, notwithſtanding the long interval of above a year and a quarter, and notwithſtanding an earneſt recommendation in the king's ſpeech to compoſe the paſt differences, hoſtilities between the two houſes about Skinner's caſe were inſtantly renewed.

THE commons began. A book, intitled "The Grand "Queſtion concerning the Judicature of the Houſe of Peers "ſtated and argued," and both relating the particulars of Skinner's caſe and vindicating the proceedings of the lords in it, had been recently publiſhed. Angry at its contents, the commons the very day of the ſeſſion (*t*) ordered the publiſhing bookſeller to be ſent for. On the ſame day (*u*) they appointed a committee to report how the caſe ſtood between the two houſes in Skinner's buſineſs. The third day (*w*), upon receiving the committee's report, and finding by it that the lords had fined Sir Samuel Barnadiſton, and that an entry

(*t*) Journ. Comm. 19. Oct. 1669.

(*u*) 3. Hatſ. 189.

(*w*) Journ. Comm. 22. Oct. 1669.

had

had been made in the office of the auditor of the receipt of the exchequer as if the fine had been paid by him, and that he had been thereupon ſet at liberty, which gave the appearance of ſubmiſſion to the ſentence of the lords, the commons examined Sir Samuel (*x*); and diſcovering this to be a mere *contrivance* and his having been myſteriouſly liberated on one of the adjournment days of the laſt ſeſſion without payment of the fine, they reſolved, that he had behaved as a good commoner of England. The next day they appointed a committee to bring in a bill for ſettling the difference in point of juriſdiction between the two houſes, and Mr. Solicitor General Finch was deſired to expedite it. On the ſame day they examined the bookſeller who publiſhed The Grand Queſtion; and found that the book was ſent to him by lord Hollis, with direction to print it, and as it was printed without the licence then neceſſary, they ordered him to be indicted upon the licenſing act. At the ſame time to do juſtice to their own ſide of the argument, they deſired their managers at the conferences formerly had with the lords, to perfect the arguments uſed for the commons and to deliver them to be entered on their journals (*y*). To ſhew the fixedneſs of their determination to have a bill for ſettling the matter, they ſtopped all other committees from ſitting. In the courſe of a few days the bill they had ordered was brought in; and upon the ſecond reading, a clauſe for vacating the judgment againſt Sir Samuel

(*x*) 3. Hatſ. 191.

(*y*) Mr. Hatſell's book has not the entry of the arguments thus ordered to be entered. But probably the order was complied with; and it is poſſible that the arguments may be ſtill preſerved.

Barnadiſton

Barnadiſton and cancelling the relative proceedings was carried; and though the bill was recommitted, yet ſuch expedition was uſed, that on the 3d of November the bill was paſſed, with the title of "An Act concerning certain Proceedings in Par-"liament;" and the next day Sir Robert Atkins was ſent with it to the lords (z). Still further alſo to wound the lords, the commons a few days after reſolved, that no member of their houſe and of the long robe ſhould without their leave plead as counſel in any cauſe before the lords (zz).

HITHERTO the lords during this ſeſſion had abſtained from touching upon the ſubject of their conteſt with the commons about juriſdiction in Skinner's caſe; and as if enough gratified by the device practiſed to give the appearance of ſubmiſſion to their ſentence againſt Sir Samuel Barnadiſton, had been content with exerciſing the appellant judicature over equity. But upon receiving the judicature bill of the commons, the lords, though they had recently loſt Mr. Prynne the indefatigable aſſertor of their claims (zzz), reſumed their activity on the ſubject. Not only did the lords reject the bill from the commons, but the lords on the ſame day ordered their committee of privileges to prepare a bill "Concerning Privilege and Judi-"cature in Parliament," which, it may be well ſuppoſed, was of a very oppoſite deſcription; and what was remarkable

(z) See 3. Hatſ. 194. to 197. What the contents of the bill were, doth not appear. Perhaps it may be ſtill extant amongſt the papers belonging to the two houſes.

(zz) 1. Grey's Deb. 159.

(zzz) Mr. Prynne died 10. Oct. 1669.

enough,

enough, lord chief juſtice Vaughan, who had been recently placed at the head of the common pleas, acted as ſpeaker of the lords for lord keeper Bridgman, and ſo underwent the mortification of putting the queſtion, without being at liberty to ſay a word againſt that original juriſdiction which he had in the beginning of Skinner's caſe, and ſo long as his being a member of the commons gave the opportunity, uniformly concurred in reſiſting (*a*). In conſequence of this order of the lords for a bill concerning privilege and judicature in parliament, a bill was ſoon brought in; and having been read for the third time, it was paſſed by the lords with the title of "An Act for limiting of certain Trials in Parliament and "Privilege of Parliament, and for further aſcertaining the "Trial of Peers and all Others his Majeſty's liege People;" and immediately after paſſing the lords ſent it to the commons (*b*).

UPON receipt from the lords of this counter-bill to the bill of the commons concerning parliamentary judicature; the latter (*c*) were provoked into further activity againſt the lords. A day was indeed appointed for reading of the bill; and after one adjournment it was read for the firſt time. But, upon its being moved the ſame day for a ſecond reading, it

(*a*) Journ. Dom. Proc. 15. Nov. 1669.

(*b*) Journ. Dom. Proc. 16. 17. 18. 19. 20. & 21. Nov. 1669.

(*c*) See extracts from the obliterated Journal of the Commons in 3. Hatſ. 197. fol. 22. 24. & 27. Nov. and 1. 4. 7. 8. & 10. Dec. 1669.

paſſed

paſſed in the negative (*d*). Nor did the commons ſtop here. A few days after, they reſolved to deſire a conference with the lords on their judgment and fine againſt Sir Samuel Barnadiſton; and with a view to ſuch requeſt, they appointed a committee to prepare reaſons for the conference (*e*). Upon report alſo from this committee, the houſe reſolved upon five diſtinct propoſitions as proper to be inſiſted upon to the lords, namely;—1. that it is *the inherent right of every commoner to preſent petitions to the houſe of commons in caſe of grievance, and of that houſe to receive them* (*ee*);—2. that it was the right of the houſe to determine how far ſuch petitions are fit or unfit to be received;—3. that no court has power to cenſure a petition to the houſe of commons unleſs tranſmitted from thence;—4. that the cenſure and proceedings of the lords againſt Sir Samuel Barnadiſton were in ſubverſion of the rights and privileges of the houſe of commons and of the liberties of the commons of England;—and 5. that the continuance upon record of the judgment by the lords in the caſe of Skinner and the **Eaſt India** Company was prejudicial to the rights of the commons of England. Alſo upon a further report from the ſame committee, the houſe of commons reſolved

(*d*) See account of the debate in 1. Grey's Deb. 189. to 195.

(*e*) Ibid. 209. 210.

(*ee*) So encouraging is the habit of the houſe of commons to receiving petitions of grievance, that at the beginning of every new parliament, they appoint one grand committee for *grievances*, and another for *courts of juſtice*, and both are appointed to ſit in the houſe once a week. See Journ. Comm. 13. Nov. 1761.

upon

upon ſeveral general heads of reaſons *(f)* to be uſed at the conference intended to be deſired; and at the ſame time reſolved, that

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(f) The heads of reaſons for the *firſt three points* reſolved on by the commons were theſe.—" *It hath been always, time out of mind, the conſtant and uncontro-* " *verted uſage and cuſtom of the houſe of commons, to have petitions preſented to them* " *from commoners, in caſe of grievance publick or private; in evidence whereof it is* " *one of the firſt works done by the houſe of commons to appoint a grand committee to* " *receive petitions and informations of grievances.*—That in no age that we can " find, any perſon, who preſented any grievance by way of petition, to the houſe " of commons, which was received by them, was ever cenſured by the lords with- " out complaints of the commons.—That no ſuitors for juſtice, in any inferior " court whatever in law or in equity, exhibiting their complaint for any matter " proper to be proceeded upon in that court, are therefore puniſhable criminally " though untrue, or ſuable by way of action in any other court whatever; but are " only ſubject to a moderate fine or amercement by that court; unleſs in ſome " caſes ſpecially provided for by act of parliament, as appeals or the like.——In " caſe men ſhould be puniſhable in other courts for preparing and preſenting pe- " titions for redreſs of grievances to the houſe of commons, it may diſcourage and " deter his Majeſty's ſubjects from ſeeking redreſs of their grievances, and by that " means fruſtrate the main and principal end for which parliaments were or- " dained."

For the fourth point the inſtruction was to inſiſt " that no petition, nor any " other matter *depending* in the houſe of commons can be taken notice of by the " lords without breach of privilege, unleſs communicated by the houſe of com- " mons."

The houſe of commons, as a concluſion to the firſt four points, added the following inſtruction.

" Upon concluſion of the four firſt propoſitions it is further to be alledged, that " the houſe of peers, as well as other courts, are in all their judicial proceedings " to be guided and limited by law: but if they ſhould give a wrongful ſentence " contrary to law, and the party grieved might not ſeek *redreſs* thereof in FULL " PARLIAMENT, and to that end repair to the houſe of commons, who are part

" of

that the lords ſhould be deſired *to vacate both their judgment againſt Sir Samuel Barnadiſton and their judgment againſt the Eaſt India Company.*

THUS far had the houſe of commons proceeded on the tenth of December 1669. But in this ſtage of the proceeding, it was thought fit by the king to ſtop the progreſs of quarrel between the two houſes: and accordingly on that day he prorogued the parliament to the fourteenth day of February; and ſo the ſeſſion terminated without paſſing ſo much as one act, and the conſequence to the king was diſappointment of a ſupply of £400,000. which had been voted to him by the commons (*g*).

ON the day appointed by the prorogation the parliament being again aſſembled, the king made a ſpeech, one part of which anxiouſly guarded the two houſes againſt revival of the difference between them (*h*). But yet as early as the fifth day of the ſeſſion (*i*) the commons fixed an early time for reſuming

" of the legiſlative power, that either they may interpoſe with their lordſhips for " the reverſal of ſuch ſentence, and prepare a bill for that purpoſe, and for preventing the like grievance for the time to come, the conſequence thereof would " plainly be, both that *their lordſhips judicature* would be *boundleſs and above law*, " and that the party grieved ſhould be without remedy."

For ſupport of the fifth propoſition the reference was to be to the reaſons formerly offered againſt the judgment of the lords againſt the Eaſt India Company.

(*g*) 1. Chandl. Deb. Comm. 132.

(*h*) Journ. Dom. Proc. 14. Feb. 1669-70. & Journ. Comm. for ſame day.

(*i*) Journ. Comm. 18. Feb. 1669-70.

conſideration

conſideration of the juriſdiction of the lords. This was enough to convince the king, that unleſs ſomething beyond a general diſſuaſion was adopted on his part the diſpute would ſoon recommence; and that the ſupplies, for which he had urgently preſſed in his ſpeech, were in danger of being interrupted. In order, therefore, to prevent the further interruption of parliamentary buſineſs, the king made a ſpeech to the lords and commons (*k*), offering his mediation between the two houſes in the caſe of Skinner. His propoſal to them for ending their difference was, that he ſhould give preſent order to eraze all records and entries of this matter in the council books and in the exchequer; and that the two houſes ſhould do the like; ſo that no memory might remain of the diſpute. This propoſal of the king (*kk*) was inſtantly accepted by both houſes. In the printed journal of the commons there is an entry of the king's ſpeech, and of their reſolution in compliance with it to make a razure or vacat in their journals of all matters relating to the buſineſs between the Eaſt India Company and Skinner, and of the making of ſuch razure or vacat accordingly in the houſe (*l*). But it is obſervable, that the printed journal of the lords is with a blank on this part of the buſineſs of the day, neither giving the king's ſpeech (*m*), nor an entry of their

(*k*) Journ. Comm. 22. Feb. 1669-70.

(*kk*) See Hume's Hiſt. chap. 65. Mr. Hume's account is, "that the king "prevailed with the peers to accept of the expedient *propoſed by the* COMMONS." But the king's ſpeech entered in the journal of the commons ſufficiently proves *him* to have been the *propoſer* to both houſes.

(*l*) Ibid.

(*m*) See in 1. Chandl. Deb. of the Lords 105. a note on the king's ſpeech in this buſineſs.

manner of proceeding upon the occaſion. In other words, the lords equally with the commons accepted the king's expedient, and equally with them complied with the terms of it in point of razure and obliteration: but the lords choſe to do this in the way, which to them ſeemed leaſt wounding to their extenſive claims of judicature; and for that purpoſe left their journal without a trace of the cauſe and manner of obliteration, or ſcarce a memento of the ſubject of it.

THUS at length this great caſe of Skinner againſt the Eaſt India Company, after engaging the lords and commons in ſerious quarrel during almoſt two years, was concluded through the ſource of recommendation whence the caſe was introduced into parliament: for from the king's recommending the caſe to the houſe of lords their cognizance of it commenced, and from his recommendation alſo proceeded the compromiſe by which the quarrel of the two houſes about the caſe was finally diſpoſed of. Whilſt the contention laſted, it was a hard ſtruggle on the part of the lords to fix their claim of *original* juriſdiction over *civil* cauſes, to fix their claim of *aſſeſſing damages*, to fix their claim of *fining* and *impriſoning at pleaſure*, and to aſſiſt their claim of the *ſole judicature of parliament*. On the part of the king alſo it was obvious, that he was not averſe to all theſe pretenſions of the ariſtocracy, ſo far as they tended to exclude the commons: for he not only firſt recommended the cognizance of the caſe to the lords; but at their requeſt poſtponed a prorogation to facilitate the completion of their operation of fining and impriſoning Sir Samuel Barnadiſton; and his miniſters afterwards concurred in the contrivance of releaſing him, as if he had ſubmitted to the juriſdiction and paid the fine, when

when according to the reality of the caſe the payment was a mere juggle, and he was liberated by order of the lords gratuitouſly, and without any ſubmiſſion whatever. But the iſſue was unfavourable both to the king and to the lords. To the king it was diſcreditable; becauſe, after having in ſome meaſure encouraged the lords to take cognizance of the caſe and avowed himſelf ſufficiently to ſhew his wiſh to ſide with them in the conteſt, he found himſelf neceſſitated for the ſake of pecuniary ſupply to propoſe a retreat to them. To the lords the conteſt was all loſs. From the ſtirring of the queſtion, it was diſcloſed, that almoſt all Weſtminſter Hall, except Mr. Prynne, was againſt the main pretenſions of the lords: and there followed votes of the houſe of commons, proclaiming to the people of England, that the claim of exerciſe of *original* juriſdiction by the lords in *civil* cauſes was an uſurpation; that the *ſupreme* juriſdiction was not in the lords, but in the *full* and *whole* parliament; and that when the lords fined and impriſoned perſons for complaining by petition to the houſe of commons, it was a breach of their privilege and an invaſion of the rights of the people at large. In *form*, indeed, the compromiſe of the quarrel between the two houſes was mutual ceſſation of hoſtility, with mutual obliteration from their journal. But in *ſubſtance* there was a vaſt difference between the two obliterations. The obliteration by the lords included vacating the judgment againſt the Eaſt India Company, and the judgment againſt Sir Samuel Barnadiſton, without an iota of proteſtation exception or reſerve; that is, included the whole of the requiſition reſolved upon by the commons immediately before the king's mediation. But the commons in their obliteration only yielded the razure of their

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own proceedings, when the object of them was sufficiently accomplished by annullation of the judgments they had throughout sought to annul. The lords gave up their two judgments. The entry, of the vigorous proceedings to obtain that sacrifice from the lords, was the only concession made by the commons. The consequences also of the compromise corresponded with these views of it: for it operated as a blow so fatal to the claim of the lords to an *original* jurisdiction, that the exercise in *civil* causes has ever since been relinquished; and it also made such an impression upon the other judicative pretensions of the lords, that new controversies were soon generated between the houses.

SUCH was the great contest between the lords and commons about *original* jurisdiction in this famous case of Skinner and the East India Company; and such also are the remarks, which at present occur to the prefacer upon the nature and issue of that contest. The narrative of it has gradually run into an unexpected and as it is feared a tiresome length. The temptation to engage in so full and laborious a relation arose, from the constitutional importance of the case, from its connection with the following treatise of Lord Hale, and from a persuasion of its having been hitherto so slightly and imperfectly stated as not to be sufficiently understood; and these considerations, it is hoped, will move the learned reader to forgive his being so long detained with a single case.

AFTER the compromise in Skinner's case, the business of the session both on the supply to the crown and otherwise went on smoothly for many months. More particularly nothing further

further appears to have occurred between the two houſes as to judicature, except a ſlight communication between them about a ſummons or notice to Mr. Hale a member of the commons on a petition of appeal againſt him by a Mr. Slingſby (*n*) to the lords. Sir Thomas Lee, father of the late lord chief juſtice of that name and his brother the judge of the prerogative court, moved for a conference with the lords, the ſummons of Mr. Hale noticing him as a member. But after ſome ſhort converſation, the houſe only reſolved upon a meſſage to the lords, deſiring them "to have regard to "the privileges" of the houſe of commons. The anſwer of the lords (*o*) was, "that the houſe of commons need not "doubt, but that their lordſhips will have a regard to their "privileges as they have of their own." After this anſwer the lords examined Mr. Slingſby, as to the manner of intimating to Mr. Hale the hearing of the cauſe. On a ſubſequent day Mr. Slingſby petitioned the lords to withdraw his original petition, on the ground of his being adviſed by his counſel, that he might have his remedy in chancery, and that there was no order entered upon which he could ground an appeal. But the lords, perhaps jealous of having the relinquiſhment of the appeal conſtrued to the prejudice of their judicature, and perhaps alſo ſuſpicious that fear of the privilege of the commons was the real cauſe of the application, referred the buſineſs to the conſideration of their committee of privileges. After almoſt a month's conſideration, the Earl

(*n*) Journ. Comm. & Journ. Dom. Proc. 4. March 1669-70. & 1. Grey's Deb. 223.

(*o*) Journ. Dom. Proc. 3. and 7. March 1669-70. and 21. April 1670.

of

of Angleſey reported from the committee as their opinion, "that the lords do declare, that their proceedings had been "according to the courſe of parliament and former prece- "dents; and that the lords do aſſert it to be their undoubted "right in judicature to receive and determine in time of "parliament appeals from inferior courts, though a member "of either houſe be concerned, that there may be no failure "of juſtice in the land."—To this report the lords immediately aſſented; and it is obſervable, that on the afternoon of the very day, upon which it was made and approved, the king made a good-humoured ſpeech to both houſes, and in purſuance of his pleaſure they adjourned themſelves for ſix months.—Thus this caſe of Hale and Slingſby and the whole of the firſt part of the ſeſſion paſſed off without breach of any kind between the two houſes. But, notwithſtanding this calm, the time, for renewing the heated controverſy about the judicature exerciſed by the lords, and for the moſt ſerious quarrel between them and the commons upon the *appellant* branch of that judicature, was faſt approaching.

On the 24th of October 1670 the two houſes met according to their own adjournment, and ſo the ninth ſeſſion of the long parliament of Charles the ſecond was continued till the 22d of April 1671, when it was terminated by a prorogation. During this continuation of the ninth ſeſſion there was not any direct conteſt between the two houſes about the judicature of the lords. But there occurred a very ſerious difference (*oo*) about

(*oo*) The difference aroſe upon four ſeveral bills of ſupply to the king. Upon three of the bills the lords after a conference gave up their amendments and the bills

about the right of the lords to alter money bills; and in two conferences between the two houſes on that point (*p*),

 the

bills were paſſed. See 1. Chandl. Deb. Comm. 45. & Journ. Dom. Proc. 22. April 1670. From the debates of both houſes, it appears, that in reſpect of theſe ſupply bills ſome thought the commons over-liberal in their taxation. In the debate in the commons on one of the bills, a new way of raiſing money being ſuggeſted by Sir Thomas Meres, Mr. Henry Coventry ſaid, that unleſs they would tax the kingdom of heaven there was not any new way, for he knew not what they would tax further upon earth; and he pleaſantly aſked, whether they would give the king a *platonic* tax. 1. Grey's Deb. 350. There was alſo a bitter ſpeech by Lord Lucas againſt one of the bills, imputing to the commons a waſteful prodigality, and propoſing to check their over-liberal humour by diminiſhing the ſum granted by the ſubſidy bill. 1. Chandl. Deb. Lords. 165. A more *popular* way of conteſting the point about the money bills for the lords againſt the commons could not well have been deviſed. But the propoſal of this rare ſpecies of amendment in the upper houſe failed in the particular inſtance. However, on one of the other bills of ſupply, the lords acted, as if they ſaw the policy of their fighting the queſtion as to their altering the money bills with the advantage of appearing to leſſen the burthen of taxation: for a principal part of their amendment of one of thoſe bills was to *lower* the duties. See Journ. Dom. Proc. 19. April 1671. For the debates in the commons on the bill, which being ſo amended by the lords raiſed the great controverſy on the privilege claimed by the commons as to money bills, ſee 1. Grey's Deb. Comm. 433. 435. 441. & 463.

(*p*) See Journ. Dom. Proc. the 19. 20. & 22. April 1671. Journ. Comm. for 20. & 22. of April in ſame year. At the firſt conference the lords gave their reaſons for their claim of altering money bills in writing to the commons: and at the ſecond conference, the reaſons of the commons againſt the claim were delivered to the lords in the ſame way. The reaſons for the lords are attributed to Lord Angleſey, who was firſt of the lords appointed to frame them. As his compoſition they are printed in a little volume, which was publiſhed in 1702 with the title of, "The Privileges of the Lords and Commons Argued and Stated "in two Conferences between both Houſes." Beſides the ſeveral arguments of

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the Earl of Angleſey took the lead in argument for the lords, and Mr. Attorney General Finch, afterwards lord chancellor Nottingham, for the commons; and in the courſe of the reaſons urged on each ſide the point of judicature was thus introduced on the part of the lords. The privilege, claimed by the commons, of not having their money bills altered by the lords, was naturally enough compared with the privilege claimed by them over the judicative power. Seemingly alſo oblivious of the recent contention about judicature and its reſult, the lords in their reaſons, after exultingly calling upon the commons to produce the record or contract by which the lords had diveſted themſelves of their right as to money bills, aſſumed it as a point *undoubted* and *indiſputable*, that

the lords and commons, the book contains a diſcourſe by his lordſhip, aſſerting the rights of the lords and remarking upon the two conferences. The reaſons for the commons were certainly prepared by Attorney General Finch: for he received the thanks of the houſe on that account. Journ. Comm. 22. April 1671. The reaſons on each ſide deſerve to be admired as moſt learned temperate and able diſcuſſions of the ſubject. But Lord Angleſey and Attorney General Finch were not the only perſons, who diſtinguiſhed themſelves on the occaſion of this great conſtitutional diſpute about money bills: for in 1676 there was publiſhed, on behalf of the lords, a book intitled "The Caſe ſtated of the Juriſdiction of "the Houſe of Lords as to the Point of Impoſitions." This book, which is a maſterly compoſition, is attributed to Denzell lord Holles. The diſpute about money bills has been often revived. What has paſſed on the diſpute, between 1671 and July 1783, may be ſeen in 3. Hatſ. Prec. of Proceed. of Comm. p. 78. to 112. where alſo the ſubject is fully gone into from the earlieſt time, and the narrative of it is concluded with ſome important obſervations.—The writer of this preface is in poſſeſſion of a manuſcript on the ſame ſubject, intitled "State "of the Matter with Relation to the Amending Money Bills ſent from the "Commons to the Lords." It ſeems to have been framed for the uſe of the houſe of lords ſoon after the year 1700.

judicature

judicature was the *peculiar right and privilege of their houſe*; and then contraſted their own moderation in allowing the commons to alter bills for *judgment* in the *legiſlative way*, with the exorbitance of the commons in refuſing to allow to the lords the ſame liberty of altering *money bills*. On the other hand, thus aſſimilating the claimed privilege of the commons over grants of money to the crown, with the claimed privilege of the lords over judicature in parliament, forced the commons into ſome notice of the point of judicature. Accordingly the eloquent and profound compoſer of the reaſons on their behalf retorted upon the lords ſtrongly, but diſcreetly and ſo as not to revive a quarrel recently accommodated. To the enquiry for the record or contract, by which the lords had appropriated to the commons the right as to bills of money, his anſwer was alike declamatory. He ſaid, "To this rhetorical queſtion, the commons pray, they may "anſwer by another queſtion. Where is that record or con-"tract, by which the commons ſubmitted, that judicature "ſhould be appropriated to the lords in excluſion of them-"ſelves? Wherever your lordſhips find the laſt record, "they will ſhew the firſt *indorſed* upon the back of the ſame "roll." Leſt alſo the lords ſhould for a moment ſuppoſe any want of authorities againſt their claim of ſole judicature, he reminded them in a general way of precedents, both of the king's commiſſionating particular lords to exerciſe judicature in parliament, and of the ſharing of the commons in the ſame judicature, and alſo of one precedent of its being aſſigned for error, that the lords gave judgment without petition or aſſent of the commons. To the point, why if in bills of judicature the lords allowed the commons to amend, the commons

ſhould not allow the ſame privilege to the lords in bills of money, the anſwer was ſarcaſtic. "If," ſaid he, "contracts "were now to be made for privileges, the offer might ſeem "fair. *But yet the commons ſhould profit little by it: for "your lordſhips do now induſtriouſly avoid all bills of a judi-"cial nature, and chooſe to do many things by your own power, "which ought to be done by the legiſlative; of which we for-"bear inſtances; becauſe your lordſhips, we hope, will reform "them, and we deſire not to create* NEW *differences, but to "compoſe the* OLD."——Such was the manner of adverting to the point of judicature by the lords, and ſuch was the anſwer from the commons on the ſame point. There was no time for reply by the lords; for the king ſuddenly prorogued the parliament the afternoon of the very day of the conference at which the commons gave in their anſwer; and ſo both the bill of impoſition on foreign commodities, which cauſed the controverſy, and the controverſy itſelf, were left unfiniſhed. Therefore the lords had barely time to reſolve, that they were not ſatisfied with the reaſons and precedents of the commons, and "much diſliked their unuſual expreſ-"ſions" at the laſt conference; and to order preparation for a free conference with the commons on the ſame ſubject (*q*). But though the houſe of lords thus loſt the opportunity of replying, the anſwer of the commons did not paſs unnoticed.

(*q*) Journ. Dom. Proc. 22. April 1671. In 1. Chand. Deb. Comm. 162. an account is given of ſome replies by the lords. But this is conceived to be a miſtake.

Both

Both the Earl of Angleſey and Lord Holles (r) wrote moſt able and learned replies to it: the former in a diſcourſe publiſhed after his death with the title of "The Rights of the "House of Lords aſſerted:" the latter in a book intitled "The Caſe ſtated of the Juriſdiction of the Lords in Point "of Impoſitions." Nor is it to be denied, that in examining what was ſhortly and incidentally urged by the commons on the point of judicature, theſe two profound writers on the law of parliament took full advantage of the generality of their opponent's manner of adverting to that branch of the argument. Lord Holles more eſpecially anſwered the Attorney General Finch's rhetorical challenge to the lords to produce the record proving their claimed *privilege of judicature*, by inſiſting, that the parliament roll of the firſt of Hen. 4. was ſuch a record, but wanted the promiſed *indorſement* which was to prove their claimed *privilege of money bills*. But on the other hand, it is to be recollected, that in this part of the argument, which was not on the immediate point in queſtion, and was barely touched upon by the lords, the great ſpokeſman for the commons was only returning one rhetorical flouriſh by another.

(r) Both of theſe noble perſons were deeply verſant in the records and law of parliament. Lord Angleſey was alſo a great collector of law records. The prefacer is poſſeſſed of a folio volume, which contains a large manuſcript abridgment of records of pleas in the king's principal courts from the reign of E. 1. to that of Hen. 6. incluſive: and a memorandum, dated in 1664 and prefixed to this abridgment mentions, that the copy of the records cited in the book was borrowed from Lord Angleſey.

DURING

DURING the three next ſeſſions of the long parliament of Charles the Second, many heats prevailed. But they were chiefly on the management of public affairs by the king and his miniſters; and it does not appear, that in either of thoſe ſeſſions the two houſes became engaged in any difference about the judicature of parliament. The lords were ſo far mindful of their reſult of the quarrel in the caſe of Skinner, as to abſtain from *original* juriſdiction. On the other hand their exerciſe of *appellant* juriſdiction over *equity* was not interrupted. Over courts of *law* the appellant juriſdiction exerciſed by the lords under the king's writ of error, however queſtionable as to its being *final*, was of courſe; for the authority of ſuch a commiſſion to the lords had not been controverted; all that the commons in that reſpect contended for in Skinner's caſe having been, that the *ſupreme* appellant juriſdiction of every kind was in the WHOLE parliament. Nor though the exerciſe of appellant juriſdiction by the lords over equity was without commiſſion of any kind from the crown, and upon their own authority only, was it complained of or repreſented to the commons; and that houſe, as their conduct ſhewed, was not for the preſent at leaſt diſpoſed to engage in a new controverſy about judicature, without ſomething brought before them to provoke the diſcuſſion.

BUT the next ſeſſion, which was the thirteenth of Charles the Second's long parliament and commenced in April 1675, produced a new violent breach between the two houſes concerning judicature. In the former great breach their contention was chiefly on the *original* juriſdiction exerciſed by the lords in *civil* cauſes; and the reſult, though in form a compromiſe

compromiſe of differences, and for that purpoſe a reciprocity of conceſſion, was in effect and conſequences, as is before obſerved in the narrative of the caſe of Skinner againſt the Eaſt India Company and of the connected one of Sir Samuel Barnadiſton, a victory to the commons; and ever ſince ſuch *original* juriſdiction has been nearly if not wholly in a ſtate of extinction or at leaſt of dormancy. But the new quarrel of the two houſes was on a different branch of judicature, and the event of that quarrel was as different. The great point in this ſecond inſtance was on the *appellant* juriſdiction exerciſed by the houſe of lords over cauſes in the courts of *equity*; and though the quarrel terminated without the leaſt conceſſion from the commons, and they have never revoked the condemnation, which in the courſe of that quarrel they voted of the latter exerciſe of the juriſdiction; yet what has ſince paſſed ſufficiently evinces, that at leaſt the conſequences of victory are in poſſeſſion of the houſe of lords.

In this great quarrel about *appellant* juriſdiction over equity, three different caſes of appeal to the houſe of lords were involved; and in all three of them the petitions of appeal were againſt members of the houſe of commons. Thus all were mixed caſes; beginning with the conſideration of the *privilege* of parliament in ſuits againſt members, as it ſtood before the ſtatutes made in ſubſequent times to abridge it; and gradually embracing the point of *appellant* judicature. The firſt and leading caſe was an appeal by Dr. Shirley againſt Sir John Fagg. In the ſecond Sir Nicholas Stoughton appealed againſt Mr. Onſlow. In the third Sir Nicholas Criſpe and others were appellants againſt Mr. Dalmahoy and others. The former

mer of theſe three caſes was introduced to the commons early in May 1675 (*s*) by a notice of the houſe in behalf of Sir John Fagg, that he had been ſerved with an order of the lords to anſwer the petition of Dr. Shirley. At firſt it took much the ſame courſe as the before-mentioned caſe of Slingſby's petition againſt Hale in 1671; both houſes looking to the latter caſe as their precedent. But the appeal not being dropped by the petitioner Dr. Shirley, as it was in the caſe of Hale, the commons (*t*) reſolved, that Dr. Shirley ſhould be ſent for in cuſtody of the ſerjeant at arms attending their houſe, to anſwer his breach of privilege for proſecuting the appeal againſt Sir John Fagg during the ſeſſion and privilege of parliament; and Sir John, who had appeared and anſwered before the lords (*u*), was ordered not to proceed on his part without leave of the houſe. After ſome interruption from Lord Mohun in the execution of the warrant for apprehending Dr. Shirley, and after an unavailing complaint by the commons to the lords on that head, the commons (*w*), amongſt other ſteps, voted Dr. Shirley's appeal a breach of privilege; and on the ſame day, taking up Sir Nicholas Stoughton's appeal againſt Mr. Onſlow in the ſame way as they had treated the caſe of Shirley and Fagg, the commons further reſolved, that whoever ſhould appear at the bar of the

(*s*) Journ. Comm. 4. 7. & 8. May 1675. 3. Grey's Deb. 104. 106. & 112. Journ. Dom. Proc. 5. & 6. May 1675.

(*t*) Journ. Comm. 12. May 1675.

(*u*) Journ. Dom. Proc. 7. & 12. May 1675.

(*w*) Journ. Com. 15. May 1675.

lords

lords to proſecute any ſuit againſt a member of the commons ſhould be deemed an infringer of the privileges of their houſe. The next material thing (*x*) was an anſwer of the lords to a meſſage from the commons on Mr. Onſlow's caſe; and this anſwer was, "the lords do declare, that it is the *undoubted* "right of the lords in *judicature*, to receive and determine, "in time of parliament, *appeals from inferior courts*, though a "member of either houſe be concerned, and from this right "and the exerciſe thereof their lordſhips will not depart." This was inſtantly anſwered by a reſolution of the commons, aſſerting it to be the undoubted privilege of their houſe "that "no members be ſummoned to attend the houſe of lords "during the ſitting or privilege of parliament." The commons at the ſame time ſent to deſire one conference with the *lords* on this point of *their anſwer* as to the privileges of the commons in Mr. Onſlow's caſe, and another about the warrant of the commons for apprehending Dr. Shirley. A conference accordingly took place on the latter ſubject, and at the deſire of the lords there was a ſecond. But (*y*) the lords not anſwering the requeſt of a conference as to Mr. Onſlow's caſe, the commons repeated their requeſt in words confining the ſubject to *their own privileges* without reference to the *anſwer of the lords* on Mr. Onſlow's caſe aſſerting *their appellant judicature*. Upon this ſecond requeſt the lords explained, that the former one was refuſed, in reſpect that the *whole* matter of it concerned *their judicature, on which they could not admit debate or conference*; but that as to this ſecond requeſt

(*x*) Journ. Comm. 17. 18. 20. & 21. May 1675.

(*y*) Journ. Comm. 28. May 1675.

concerning *the privileges of the commons* the lords agreed to the conference, *provided that nothing ſhould be offered at it concerning the judicature of the lords.* However thus granting the conference, under limitation not to meddle with Mr. Onſlow's particular caſe or the claimed judicature of the lords, gave ſuch offence to the commons, that they conſtrued it not agreeing to the conference deſired, and ſo did not attend it. After this the commons received a report from a committee they had before appointed both for Mr. Onſlow's caſe and Mr. Dalmahoy's of the proceedings before the lords on the petition of appeal againſt Mr. Dalmahoy. Thus the third of the three caſes of privilege out of which this quarrel, firſt of *privilege* and then of *appellant judicature*, originated (*z*), was more particularly brought forward. It appearing alſo, that Mr. ſerjeant Pemberton and other counſel had pleaded at the bar of the lords as counſel againſt Mr. Dalmahoy, notwithſtanding the order of the commons that proſecuting at ſuch bar againſt a member of their houſe ſhould be a breach of their privilege, the commons ordered all the counſel to be committed to the cuſtody of their ſerjeant at arms, though the counſel had excuſed themſelves under an order of the lords enjoining their attendance. Further the commons, finding that Sir John Fagg, after their having at his inſtance taken up his caſe of privilege, had anſwered the appeal againſt him, voted it a breach of the privilege of the houſe and committed him to the Tower for it. But Mr. Dalmahoy was excuſed by the commons; becauſe after their beginning to conſider the privilege he had ſtood upon it without appearing further or making defence.

(*z*) 1. June 1675.

HITHERTO

HITHERTO the quarrel between the two houſes on theſe three caſes of Fagg Onſlow and Dalmahoy was on the *privilege of the commons* in ſuits particularly before the lords, as that ſpecies of *privilege* of parliament ſtood before the ſtatutes reſtricting it to the (zz) perſon. But theſe orders for commitment of the counſel of Sir John Fagg by the commons, and the execution of one of them, ſoon forced into conſideration the APPEL-

(zz) See 12. W. 3. c. 3. 2. & 3. Ann. c. 18. 11. G. 2. c. 24. 4. G. 3. c. 33. & 10. G. 3. c. 50. The prefacer is poſſeſſed of a collection of Manuſcript Reports by Sir Orlando Bridgman; and in that collection there is a curious caſe on the privilege of parliament, as it ſtood before the ſtatutes above cited. It was the caſe of Benyon and Evelyn before the court of common pleas in Trin. 14. Cha. 2. and the firſt point was, whether an original might be ſued out againſt a member of the houſe of commons and be kept up againſt him by continuances whilſt he continued a member. The report contains a very full and elaborate diſcuſſion of this point in a judgment delivered by Sir Orlando Bridgman as lord chief juſtice.— This collection of reports by Sir Orlando conſiſts of five folio volumes. The firſt contains reports by him in Law French of caſes in the king's bench and exchequer chamber from the firſt to the fifteenth of Charles the Firſt. The four other volumes are Engliſh reports by Sir Orlando whilſt he was the chief juſtice of the common pleas. The firſt of theſe four latter volumes conſiſts chiefly of ſhort notes of caſes. The three other volumes contain about thirty ſelect arguments for the moſt part by himſelf on giving judgment in the common pleas and in the exchequer chamber. The ſelect arguments were apparently written compoſitions; and are ſuch as give a vaſt idea both of his learning talents and induſtry. All the four volumes for the time he was chief of the common pleas are fair copies ſeemingly with a view to printing. Whether the originals exiſt in the hands of his deſcendant Lord Bradford or of any other perſon, or whether any reports by Sir Orlando whilſt he was lord keeper are exiſting, the prefacer is uninformed. This notice is given, becauſe there may be occaſions, upon which a reference to the reports of ſo great a lawyer may become material to the law and juſtice of the country. In 1. Lord Raymond's Reports 380. Lord chief juſtice Holt cites the caſe of Chamberlaine *v.* Preſcott from Sir Orlando Bridgman's Reports; and the extract there given from them agrees with the ſame report in the collection of which the prefacer is thus poſſeſſed.

LANT *juriſdiction* exerciſed by the lords over decrees in *equity*. Shortly after the commitments (*a*), the commons, at a conference with the lords, communicated in writing the reaſons of the commons for not meeting to confer with the lords upon privilege without referring to Mr. Onſlow's caſe, which was the only ſubject matter of the conference ſo unattended. But being previouſly informed of the recent commitments by the commons, and being therefore prepared, and having actually releaſed one of the perſons ordered to be committed, and prohibited all gaolers and others from moleſting any of them (*b*), the lords gave a formal notice of theſe ſtrong meaſures to the commons, with ſome comments on the provocation they had given to the lords. This notice was expreſſed in proud and angry language. It repreſented the houſe of lords, as the place, *where the king is* HIGHEST *in his royal eſtate, and where the* LAST RESORT *of judging upon writs of error and appeals in equity in* ALL CAUSES *and over* ALL PERSONS *is* UNDOUBTEDLY *fixed and permanently lodged.* It ſtated it as an *unexampled* breach of privilege againſt the houſe of peers, that their orders or judgments ſhould be diſputed or obſtructed by the lower houſe; informing them, that they are no court, nor have authority to adminiſter an oath or give any judgment. It pointed at the orders of commitment, and other orders by the commons, as a tranſcendent invaſion of the rights and liberty of the ſubject, and againſt *magna carta*, the petition of right, and many other laws, which have provided, that no freeman ſhall be impriſoned or otherwiſe reſtrained of his liberty but by due

(*a*) Journ. Comm. 2. & 3. June 1675.

(*b*) Journ. Dom. Proc. 2. & 3. June 1675.

proceſs

proceſs of law. It ſtated the proceeding of the commons as tending "to the ſubverſion of the government of this king-"dom and to the introducing of arbitrarineſs and diſorder:" becauſe, added the lords, "it is in nature of an injunction "from the lower houſe, who have *no authority nor power of* "*judicature over inferior ſubjects, much leſs over the king and lords* "*againſt the orders and judgments of the* SUPREME *court.*" It exultingly concluded with referring the commons to the roll of parliament of 1. Hen. 4. (*bb*) and to make this reference the more ſolemn, the peers who managed for the houſe of lords, were armed with the original record in their hands, and were commanded to read it to the commons, as if (according to the language of one (*c*) who was a great lawyer, and though in general

(*bb*) It appears by the journal of the lords, that the keeper of the records of the Tower was ordered to furniſh their houſe with copies, not only of the parliament roll of 1. Hen. 4 No. 79. to which the lords thus referred the commons, but alſo of the parliament rolls of 4. H. 4. No. 10. & 9. H. 4. No. 21. to which however, the commons were not referred.

(*c*) Sir Robert Sawyer. Of his arguments in the courſe of this quarrel between the two houſes about privilege and the appellant juriſdiction, there are many ſhort notes in Mr. Grey's Debates. See vol. 3. p. 127. 143. 200. 223. 243. & vol. 4 p. . The vaſt learning and ability of Sir Robert Sawyer are ſufficiently teſtified by his wonderfully profound and extenſive argument for the crown in the great London *quo warranto* caſe in the reign of Charles the Second. By thus referring to that argument, it is not meant in any degree to intimate any impreſſion as to the real law of that famous caſe. The tranſitions of Sir Robert Sawyer's life as a member of parliament and lawyer are particular. In this great ſtruggle of the commons about appellant juriſdiction over equity he took a deciſive part againſt the claims of the lords. About five years afterwards and when he had been ſpeaker of the commons, he was made attorney general, and in that office ſo conducted the ſtate proſecutions during the latter part of the reign of Charles the Second and for ſome years of the reign of his bigotted and unfortunate ſucceſſor, as to render himſelf very unpopular if not

general an over devotee to the court and to prerogative, was a ſtrenuous ſupporter of the commons in this hot contention between the two houſes) this *only Diana* of the lords was to be worſhipped by the commons and to awe them into ſub-

not odious. But a few months before the revolution, Sir Robert, having refuſed to ſupport the diſpenſing power claimed by King James, was removed from office: and then he was ſingled out as one of the counſel for the biſhops on their trials, and acquitted himſelf with diſtinguiſhed ability. See 1. Burn. Hiſt. fol. ed. 742. In the convention parliament, he was zealous againſt James; and in one of the debates previous to the vote of abdication even went the length of ſaying, "in all "I have read I never met, in ſo ſhort a reign, with the *laws ſo violated* and the "*prerogative ſo ſtretched*," 9. Grey's Deb. 22. When the revolution was accompliſhed, there ſeemed to be a proſpect, that his great legal and parliamentary abilities would raiſe him again into ſome high official ſituation in the law. But his rivals were eager to take advantage of his former conduct: and his harſh proceedings againſt Sir Thomas Armſtrong, who was executed on an outlawry for high treaſon notwithſtanding all the earneſt and pitiable efforts of his lady and her friends to obtain a writ of error to reverſe the judgment, the legality of which was moſt apparently queſtionable, ſoon gave the opportunity. A petition of Lady Armſtrong and her daughters was preſented to the houſe of commons; and the reſult was implicating Sir Robert Sawyer as the leader of the proſecution, and in reſpect of it he was expelled the houſe of commons. See 3. State Tri. 4th ed. 986. & 9. Grey's Deb. 525. It is obſervable, that this petition of Lady Armſtrong produced a reſolution of the houſe of commons, "that a *writ of error* for "the reverſal of a judgment *in felony or treaſon* is the RIGHT *of the ſubject and* "*ought to be granted at his deſire, and is not an act of grace or favor, which may* "*be denied or granted at pleaſure.*" This reſolution paſſed the 19th of Nov. 1689. which was about two months before Sir Robert's expulſion; and it ſeems from Mr. Grey's account of the debates on that occaſion, as if his coarſe behaviour, on declining to aſſiſt the granting of the writ of error, was one of the grounds. But on the other hand it ſhould be remembered on his behalf, that the chief witneſs examined againſt him admitted, that he did not demand execution of Sir Thomas till the judges had declared themſelves, and that as to the writ of error he ſaid it was not in his power to grant a writ of error, but that the king or lord keeper muſt be applied to by petition.

miſſion.

miſſion.—But notwithſtanding this high tone of the lords, notwithſtanding this oſtentatious exhibition of the parliamentary roll of the firſt of Henry the Fourth, as if it was a grand diſcovery of yeſterday, the commons were not in the leaſt diſheartened; but inſtantly reſolved on deſiring a conference with the lords on the ſubject of this memento from them, and appointed a committee to prepare reaſons; and ſo expeditiouſly were thoſe prepared, that the very next day reaſons were reported to the commons and were by them ſettled (*d*). Of the paper containing theſe reaſons the moſt ſtriking paſſages were to this effect.——It was obſerved as a matter much below the expectation of the commons, that the ſubject held up by the lords with ſuch ſhew of high importance ſhould prove to be "only the commitment of four lawyers" for a "mani-"feſt violation of privilege." It expreſſed much more ſurprize, that the lords, after introducing the late conference with aſſuring the commons of its being to promote a good correſpondence between the two houſes, ſhould aſſume a power to adjudge the order of commitment by the commons illegal and arbitrary, and condemn the whole houſe of commons as criminal. It aſſerted the legality of impriſonment by the commons for breach of privilege; and it denied ſuch impriſonment to be againſt the king's dignity. But it retorted that charge, by inſiſting, that the claim of the lords, to be *the ſupreme* court, and to have the king when in the judicature of their houſe conſidered as higheſt in his royal eſtate, was indeed a diminution of the dignity of the king; that the king was higheſt in his royal eſtate IN FULL parliament; and that the CLAIM OF THE LORDS WAS DEROGATORY TO THE AUTHO-

(*d*) Journ. Comm. 4. June 1675.

RITY

RITY OF THE WHOLE PARLIAMENT BY APPROPRIATING IT TO THEMSELVES. It inſiſted alſo, that the commons were only maintaining their own privileges: but that the lords did highly intrench upon the rights and privileges of the commons by denying them to be a court, or to have any power of judicature; and that if this was admitted, it would leave them without any power to preſerve themſelves. It anſwered the imputation of invading *magna carta*, the petition of right, and other laws, by forcibly obſerving, that thoſe did not take away the law and cuſtom of parliament or of either houſe; and that if it was otherwiſe, the lords had ſtrangely forgotten *magna carta* and thoſe other laws, in the ſeveral judgments paſſed by themſelves in caſes of privilege. It alſo repelled this attempt by the lords at popularity of argument, by remarking, that the commons *could not find* the lords to have *any juriſdiction in caſes of appeal from courts of equity*, by *magna carta*, or by any law or cuſtom of parliament. It firmly informed the lords, that the commons conſidered the enlargement of their priſoners as a breach of their privilege, and had therefore cauſed the perſons to be retaken and had committed them to the Tower. The concluſion was in theſe ſtrong words. "As to the parliament roll of 1. Hen. 4. (*dd*) *cauſed* "*to be read* by your lordſhips at the laſt conference, *but not* "*applied*, the commons apprehend it *doth not concern the caſe* "*in queſtion*: for that *this record was made upon occaſion of* "JUDGMENT GIVEN BY THE LORDS TO DEPOSE AND IM-"PRISON THEIR LAWFUL KING, *to which* THE COMMONS

(*dd*) The arguments in the commons on this parliament roll of 1. Hen. 4. are in 3. Grey's Deb. 240.

WERE

"WERE UNWILLING TO BE MADE PARTIES. And therefore "the commons conceive, *it will not be for the* HONOR *of your "lordſhips to make further uſe of that record.* But we are "commanded *to read* to your lordſhips the *parliament roll "of the 4th of Edward the third No.* 6 (*ddd*), which, if "your lordſhips pleaſe to conſider, they doubt not but your "lordſhips will find occaſion to apply it to the preſent pur-"poſe." Thus at length the commons not only claimed to deprive the lords of their favorite parliament roll of Hen. 4. both by the inſufficiency of its contents and by an argument IN PUDOREM, but to repreſs them by ſuch a counter-roll of parliament, as might more than compenſate the commons for the want of an *indorſement* to the roll of all their opponents. However it was not permitted to the commons thus to aſſail the lords: for after adjuſtment of theſe defenſive reaſons by the commons, and after their accordingly ſending to the lords for a new conference, the lords, though twice applied to for a conference, did not condeſcend to grant one; and in

(*ddd*) This roll is in p. 92 of the following Treatiſe, and the reaſon of the commons for referring to it was without doubt, that in their conſtruction at leaſt the roll amounted to an acknowledgment, by the lords, in the reign of Edward the third, of its being *againſt the law of the land to have commoners adjudged by the peers ſingly.* Beſides lord Hale's comment upon this famous roll, ſee 2. Inſt. 50. Prynne's Plea for the Lords 324. 3. Grey's Deb. 25. Journ. Dom. Proc. 2. July 1689. and Seld. Judic. in Parl. p. 3. Note, that at the beginning of the ſeſſion the original records of the parliament rolls of 36. Edw. 3. no. 9. 2. R. 2. no. 28. and 4. Hen. 4. no. 56. were brought into the commons in purſuance of their order, and that they referred it to a committee to tranſlate into Engliſh certain parts of them, and to ſearch whether they were upon the ſtatute roll. Journ. Comm. 14. & 15. April 1675. See further as to this matter Journ. Comm. 22. April 1675. and 3. Grey's Deb. 19. to 23.

that ſtate of things between the two houſes, the king, after ſome attempt to conciliate them, at length prorogued the parliament. The manner of it was thus. He firſt ſummoned both houſes (*e*) to attend him at the banqueting houſe in Whitehall, and there he interpoſed himſelf by a mediating ſpeech to the two houſes. In this ſpeech, he conſidered the whole affair of their quarrel as a contrivance of enemies to himſelf and the church of England, and imputed to the contrivers the deſign of procuring a diſſolution (*f*). He avowed it to be his opinion, that a compoſure between the houſes was not attainable without ſuch FULL conferences, as either might effectuate conviction on both ſides, or *enable him to judge rightly of the difference.* This ſpeech was very ſignificant. It appears ſilently to have conveyed to the lords, that, however heretofore he had favored the claim of the ariſtocracy to ORIGINAL *juriſdiction*; and however partial, notwithſtanding his now having the late attorney general Finch as his lord keeper inſtead of lord Shafteſbury, the king might ſtill be to that claim; he was by no means anxious to ſuſtain their pretenſion to the APPELLANT juriſdiction in any degree. Poſſibly he at length was enabled by the new holder of his great ſeal to ſee, that the claim by the lords to be the SUPREME DERNIER RESORT was as dangerous to the *monarchical*

(*e*) Journ. of both houſes, 5. June 1675.

(*f*) According to biſhop Burnet, lord Shafteſbury ſaid it was his contrivance: and certain it is, that his lordſhip was very vehement on the ſide of the houſe of lords in the quarrel, and in the ſecond ſtage of it was violently againſt an expedient of lord keeper Finch to ſtop the further progreſs of the quarrel. See 1. Burn. Hiſt. fol. ed. 385. lord Shafteſbury's Speech in 1. Chandl. Deb. 165. However biſhop Burnet adds, that others aſſured him it happened *in courſe*: and this ſeems moſt agreeable to the real fact.

part

part of the government, as it was inimical to the democratical part. Poſſibly alſo his own quick diſcernment, when he became thus far inſtructed, was not at a loſs to perceive, that his ambitious views of having both lords and commons at his devotion would be beſt anſwered, by a *ſole and ſupreme original juriſdiction in the lords, under the controul of a ſupreme appellant juriſdiction in the crown ſingly*; or if that could not be, at leaſt that he ſhould have the naming of commiſſioners to exerciſe the *appellant* juriſdiction in the *firſt inſtance*, that is, except when the WHOLE *parliament* ſhould interfere. So much, however, was not avowed by the king. Nor indeed could it have been, without danger of uniting the two houſes againſt himſelf. What he did avow in the ſpeech could not be *wholly* reliſhing to *either* houſe: for it may be preſumed, that neither lords nor commons wiſhed to make the king the arbiter of their reſpective privileges. But upon the whole the ſpeech, notwithſtanding a profeſſion of impartiality, was leſs unfavorable to the commons than to the lords: the recommendation of a FULL conference being the very thing, which the commons had propoſed and the lords had declined. This was ſeen by both houſes: and each acted accordingly; the lords on the one hand omitting to addreſs the king for his ſpeech; and the commons on the other hand thanking him for it (*ff*). But in one thing the conduct of both houſes after the ſpeech was the ſame: for both were active in continuing hoſtilities (*g*): and the king, finding that his mediation was unavail-

 ing,

(*ff*) For the debates in the commons upon ſo thanking the king, particularly Sir Robert Sawyer's ſpeech, ſee 3. Grey's Deb. 261.

(*g*) The ſecond day after the king's firſt ſpeech, the lords declared, that the lieutenant of the Tower detaining the four counſel committed by the commons was

ing, went to the houſe of lords, and after a ſpeech to the two houſes (*b*) terminated the ſeſſion by a prorogation; and ſo,

was againſt law; and ordered the lord keeper to require the *curſitors* to iſſue writs of *habeas corpus* for bringing the counſel to the bar of the lords; and they alſo ordered the uſher of the black rod to attach the body of John Topham the ſerjeant at arms of the commons for taking the counſel into cuſtody, and to bring him to their bar. On the next day, finding from the lord keeper, that the making out writs of *habeas corpus* for the great ſeal belonged to the *clerk of the crown in* chancery, though the two judges conſulted held them when iſſued under the great ſeal good in *law by what hand ſoever written*, the lords ordered the clerk of the crown to make out writs of *alias habeas corpus*. Notwithſtanding alſo a ſecond meſſage from the commons about a new conference, the lords were ſilent on that head. See Journ. Dom. Proc. 7. & 8. June 1675.——Nor were the commons inactive after the king's firſt ſpeech. They voted a juſtification of the lieutenant of the Tower; and reſolved, that he ſhould not make return to any writ to remove any perſon committed by them for breach of privilege. When he informed them of having been ſerved with writs of *habeas corpus* under the great ſeal, they intimated to him that he ſhould forbear to return the writs; and they directed a committee to inſpect the journals of the lords as to their proceedings about the four committed lawyers, and referred it to the ſame committee and to ſome others, to inſpect and ſearch records and entries for precedents in like caſes and to report next day. On the next day alſo, being the day on which the prorogation took place, the commons received a report from their committee, that they had found ſeveral precedents of writs of *habeas corpus* returnable in parliament, and had conſidered them, and thereupon agreed on four reſolves, which being read were unanimouſly adopted by the houſe. The firſt reſolution was, that no commoner, committed by the commons for breach of privilege, ought, without their order, to be made to appear, by writ of *habeas corpus* or other authority, and to receive determination in the houſe of peers, during the ſeſſion in which he was committed. The ſecond declared the order of the lords for the writs of *habeas corpus* for the four committed lawyers, to be inſufficient and illegal; becauſe it was general and expreſſed no particular cauſe of privilege, and *commanded the king's great ſeal to be put to writs not returnable before the houſe*

(*b*) See Journals of both houſes for 9. June 1675.

ſo without any anſwer from the lords to the laſt propoſal of a conference by the commons, the contention was for a time neceſſarily ſuſpended, and ſome publick bills of importance (*hh*) were diſappointed (*i*).

BUT the quarrel between the two houſes, about the privilege of the commons as to proceedings before the lords, and about the appellant juriſdiction exerciſed by the latter, was ſoon reſumed: and what in the firſt part was chiefly the *point of privilege* became in the ſecond part moſt directly the *point of judicature*.

THE prorogation of the parliament was till the 13th of October. Accordingly on that day the two houſes being aſſembled, the king addreſſed himſelf to them in a ſpeech, which

houſe of peers. The third was for acquainting the lord keeper with the preceding reſolutions. The fourth was for a meſſage to the lords to acquaint them, that the four counſel were committed by the commons for breach of their privilege. See Journ. Comm. 7. 8. & 9. June 1675.

(*hh*) One bill was to *prevent illegal exacting of money from the ſubject*. For the debates in the commons on this bill, which was founded on a bill of a like kind in a former ſeſſion, ſee Grey's Deb. vol. 2. p. 404. vol. 3. p. 2.——Another bill depending before the commons was to *prevent illegal impriſonment of the ſubject*. See 3. Grey's Deb. 105, 239, 276. & 320. and 2. Grey's Deb. 225. 349. 364. & 433.——A third was about *vacating ſeats in parliament by taking of offices*. 3. Grey's Deb. 53.

(*i*) For further particulars concerning this firſt part of the quarrel about appellant juriſdiction, ſee Mr. Grey's Debates of the Commons vol. 3. great part of which is occupied with the debates on the ſubject.

profeſſed

profeſſed a great deſire to prevent revival of their quarrel about privilege and appellant juriſdiction; and at leaſt ſhewed, that he was anxious to have the quarrel on thoſe points poſtponed, till the bills for ſupply of money for the public ſervice and his own wants were paſſed. He was followed in this by lord keeper Finch, who uſed his rhetoric to perſuade a careful avoiding of all queſtions leading to diſſenſion (*k*). Nor do the commons appear to have ſhewn any ſigns of a diſpoſition unneceſſarily to renew hoſtilities with the upper houſe. Indeed for the purpoſe of the commons it might have been ſufficient, that the affair of their privilege and of the appellant juriſdiction claimed by the lords ſhould be ſuffered to reſt, as they were left at the prorogation: for had the lords in this new ſeſſion deſiſted from reſuming the appeals, out of which the quarrel aroſe, and the other exerciſe of appellate juriſdiction over cauſes in equity, it might gradually have produced all the effect of a victory to their opponents. But it ſoon appeared, that the lords did not mean to leave this branch of their claim of a ſole judicature in a dormant or undecided ſtate, or even to avoid any of the particular caſes from which the quarrel of the laſt ſeſſion had originated. Even as early as the third day of the ſitting of the lords (*l*), Dr. Shirley, undiſmayed by the paſt violence of the proceedings of the commons in his caſe, preſented a petition to the lords to deſire a day for hearing the cauſe, which was depending laſt ſeſſion between him and Sir John Fagg, and was then *ſine die*. Immediately on

(*k*) Journ. Dom. Proc. & 1. Chandl. Deb. Comm. 234.

(*l*) 19. Oct. 1675.

preſenting

preſenting this petition, the lords ordered the paſſages in the king's ſpeech and in that of lord keeper Finch diſſuading the renewal of the paſt differences to be read: and probably this was done upon the ſuggeſtion, either of the lord keeper Finch or of ſome other peer, who wiſhed to encourage a poſtponement of hearing. But a *long* debate aroſe and was adjourned. The next day the ſubject was reſumed, and the lords for freer debate went into a committee of the whole houſe; and in this manner the buſineſs was in the whole debated in a committee of the whole houſe on ſix different days, and on each of them the journal of the lords calls the debate a *long* one, and on the four laſt of them no other buſineſs was permitted to intervene. Very warm ſpeeches are ſaid to have been made in thoſe various debates of the matter. But the only remains of them, which appear to have reached the preſent times, conſiſt of a ſingle ſpeech by the earl of Shafteſbury (*m*), who from the beginning ſeems to have been a moſt active encourager of the judicative claims of the lords in their full extent. However from this ſingle ſpeech, which furniſhes a fine ſpecimen of the parliamentary debate of the time, and is ſufficient to elucidate this ſtage of the controverſy about privilege and appellant judicature, it may be collected, who was at the head of the partizans for one ſide of the queſtion. In this ſpeech, it is diſcoverable, that two propoſitions were made to the lords to prevent an immediate revival of the differences with the commons. One was by the

(*m*) Lord Shafteſbury's ſpeech was probably printed ſoon after its being ſpoken. It is in the Collection of State Tracts of the Reign of Charles II. printed in 1693; and is alſo given in 1. Chandl. Deb. Lords 165.

famous

famous mathematician and aſtronomer Dr. Seth Ward biſhop of Saliſbury, who, it ſeems, had adviſed appointing a day to conſider what ſhould be done upon the petition inſtead of a day to hear it. The other was from lord keeper Finch, then a peer, afterwards earl of Nottingham and lord chancellor, and ſomewhat differed from the former, it being that *a very long* day ſhould be appointed for the *hearing*. But both of theſe propoſals were reſiſted by lord Shafteſbury in a ſtile of eloquence of the moſt impreſſive kind. In the ſpeech made by him upon this important occaſion, the great point of appellant juriſdiction is not argued; for the lords had already committed themſelves, not only not to retract from their claim of judicature, but not to hear it diſputed nor even to confer upon it. Their being thus committed muſt have put thoſe, who were for poſtponement of the hearing of the cauſe under great difficulty: for under ſuch circumſtances even Lord Nottingham, however convinced he might be, that the appellant juriſdiction did not belong to the houſe of lords (*n*), and however prepared with argument againſt it, could

(*n*) Amongſt other moſt valuable manuſcripts, which that great man the Earl of Nottingham left concerning the court of chancery and the principles and practice of equity, one part of his collections is intitled PROLEGOMENA. The firſt chapter of that work is *de Officio Cancellarii*; and at the end of it there are the following paſſages, which ſeem ſufficient to ſhew, that his impreſſions were ſtrong againſt the claim of the lords to appellant juriſdiction over equity.——"In "37. Hen. 6. 13. it is ſaid a writ of error lies in parliament upon a judg- "ment in chancery. But no writ of error lies on proceedings by *ſubpœna*: for "therein the chancery is no court of record. NO MAN THEN HEARD OF A "PETITION IN NATURE OF AN APPEAL. ELSE DOUBTLESS IT HAD BEEN "MENTIONED. In 27. Hen. 8, 18. it is argued, that an erroneous decree could "not

could not be otherwiſe than tongue-tied on the right. Being thus abſolutely excluded from the main point, both he and biſhop Ward reſorted to the only topicks of argument, which their ſide of the queſtion upon the caſe ſo narrowed would allow. Theſe were, that the caſe of Dr. Shirley was apparently and on his own ſhewing not proper for relief; that whether the commons had not a privilege of being exempt from appearing as ſuitors at the bar of the lords, was a doubtful point; that proceeding with the caſe would cauſe a breach with the commons, when, from the critical ſituation of publick affairs, it was moſt deſirable to avoid one; and that poſtponement of the hearing was an expedient, which might prevent ſuch a breach, and yet leave the claim of the lords to the appellant juriſdiction unprejudiced.

" not be reverſed in the ſame court, and therefore muſt be in parliament. It is " more natural and legal, the appeal ſhould be to the king in perſon, whoſe con- " ſcience is ill adminiſtered. So it was done in Sir Moyl Finch's caſe, and ſo " ought to be done in caſes before conſtable and marſhal. But lord Coke ſays " the firſt decree in chancery was 17. R. 2. and that as appears was examined in " parliament. By the journal of houſe of commons 18. Jam. divers bills read to " vacate ſeveral decrees *in cancellariâ*. So IT WAS FIT FOR THE LEGISLA- " TIVE AND NOT PROPER FOR THE JUDICIAL POWER OF THE LORDS AS " NOW IS USED."——The preceding extract is from a copy of manuſcripts of lord chancellor Nottingham, late the property of Heneage Legge Eſquire, ſon and heir of the honorable Mr. Baron Legge, and now by gift of Mr. Heneage Legge the property of his couſin the honorable Henry Legge ſecond ſon of the preſent Earl of Dartmouth. The manuſcripts thus referred to conſiſt of lord Nottingham's Equity Reports from the time he had the great ſeal till within a month and 4 or 5 days of his death, of the *Prolegomena* before-mentioned, and of a Syſtem of the Practice of Chancery. The writer of this preface is in the preſent poſſeſſion and uſe of theſe invaluable treaſures, through the united indulgence of the late owner and the preſent one, and under circumſtances, which evince a ſuperior delicacy of mind worthy of perſons deſcended from a lord chancellor Nottingham, and greatly enhance the favor thus received from them by the writer of this preface.

Theſe reaſons of poſtponement were encountered by lord Shafteſbury with wonderful force and adroitneſs. The firſt of them, indeed, which came from his accompliſhed rival, was not difficult to find fault with; for, without hearing the appellant's counſel, to treat his caſe as not fit to be in any manner heard, had certainly the appearance of being very exceptionable, more eſpecially after having once appointed a hearing of the caſe; and accordingly lord Shafteſbury was not a little ſevere upon his great ſucceſſor in office for reſorting to a reaſon ſo unjudicial. The three other reaſons were not quite ſo manageable. But thence lord Shafteſbury had the better opportunity of ſhewing his talent of parliamentary debate. On the reaſon from the privilege of the commons, it perhaps was found not ſo convenient to dwell very much: for probably at that time it ſcarce ſeemed compatible with the independence of the commons, that without their previous conſent their members ſhould be amenable to the bar of the upper houſe. Inſtead, therefore, of deeply conſidering that point, lord Shafteſbury artfully endeavoured to take off the influence of the mover of it, not only by hinting at the active zeal, which the lord keeper had ſhewn whilſt he was a member of the lower houſe for their privilege in money bills and incidentally againſt the judicature of the lords, and for which he had been thanked by the lower houſe; but by obſerving on the difficulty ſuch a perſon muſt find to think the lords in any manner in the right againſt the judgment of the commons. But the great burſt of lord Shafteſbury's eloquence was upon the two remaining reaſons of poſtponement. In anſwering them he appears to have touched every ſtring, which could inflame or faſcinate the paſſion of the lords for judicature, into a conviction,—that judicature was the

the life and ſoul of the peerage;—that on the exerciſe of judicature by the lords depended one of the grand equilibriums of the conſtitution;—that in contending for judicature the lords had their ALL at ſtake;—that to poſtpone and heſitate was to ſurrender that ALL to the king and commons, or rather according to his view to the king only;—and that if reaſons of ſtate were to weigh, the conjuncture of the time was ſuch, as to make diſſention deſirable, as being the beſt means of checking a ſecret deſign, which he imputed to thoſe neareſt the king, of cloſe connection with the court of France at the riſque of the reſt of Europe and more eſpecially of England. Having ſpoken upon theſe topicks, he made a concluſion, which in deſign reſembled the beginning of his ſpeech. As the early part was calculated to take off the influence of the lord keeper Finch; ſo the latter part was equally framed with a view to prevent any influence from the bench of biſhops. For that purpoſe it was laboured by lord Shafteſbury to impute the difference between him and the biſhops, to a difference of political principles; to his being ſo fixed in the principle, that the king is king by law; and to their being ſo addicted to the doctrine of the divine right of monarchy and the conſequential principle of paſſive obedience (*nn*). After thus impreſſing the

(*nn*) It may throw ſome light on the origin of the rage for the divine right of monarchy and the ſiſter doctrine of indefeazible right of ſucceſſion, during the reigns of James the Firſt and his ſon Charles and of the two ſons of the latter, to recollect, how the ſucceſſion to the crown of England ſtood at the death of queen Elizabeth.—Henry the Eighth had been entruſted by acts of parliament with the power of limiting the ſucceſſion to the crown of England according to his own will and pleaſure. To give ſo vaſt a diſcretion ſeems extraordinary. But it ſhould be conſidered, that his daughters Mary and Elizabeth had both been illegitimated by acts of parliament. Probably therefore *one* reaſon for creating this high truſt

was

lords with the idea, that in this conteſt for appellant judicature he was ſtruggling to preſerve the entirety of the conſtitution againſt

was to inveſt the king with a diſcretion of ſo replacing them in the ſucceſſion, as to avoid the inconſiſtency of re-legitimating them. But whatever the reaſons were, if the laſt will attributed to him is authentic, he exerciſed the power ſo as to accompliſh that purpoſe: for in default of heirs of the body of his ſon Edward and of his own body by his wife Catherine Parr or otherwiſe, Henry's laſt will limited the crown to Mary and Elizabeth and their iſſue ſucceſſively. Had the will of Henry ſtopped there, the right of James the Firſt to ſucceed to the crown of Elizabeth would have been wholly exempt from difficulty: becauſe he was heir of the body of Margaret queen of Scots eldeſt ſiſter of Henry. But the will attributed to Henry did not ſtop at the limitations to Mary and Elizabeth and their iſſue. It proceeded further; and what was very important to the famous Mary queen of Scots during her life and afterwards to her ſon and heir our James the Firſt, the ſame will of Henry preferred the iſſue of his *younger* ſiſter the *dowager queen of France* to the iſſue of his *elder* ſiſter *Margaret queen of Scots*. This indeed was enough to make king James and his family devotees to the divine right of kings and the conſequential bigotry of indefeazible hereditary ſucceſſion to the crown: for if the objections, which had been made to the authenticity of the will of Henry, were not tenable; and if the objections, which had alſo been made to the validity of the marriage of Henry's ſiſter the dowager queen of France with her ſecond huſband Brandon Duke of Suffolk, alſo failed; then, not James the Firſt, as heir of the body of Henry's elder ſiſter the queen of Scots, but ſuch perſon, as at the death of Elizabeth was heir of the body of his younger ſiſter the dowager queen of France, became intitled to the crown, unleſs the divine right of monarchy and the indefeazibility of ſucceſſion to the throne could be called in aid, and being ſo called were ſufficient to do away the force of an act of the whole legiſlature and of an inſtrument made under legiſlative authority.—But according to this view of the caſe, there might be ſomething beyond bigotry in the zeal of thoſe, who formerly diſgraced themſelves by the nonſenſe of the *divine indefeazible* right to crowns, particularly the crown of England.——On the preſent occaſion to go deeply into this curious ſubject, would be too great a digreſſion. It is therefore reſerved for ſome future occaſion. But it may be gratifying to thoſe, who are fond of genealogical hiſtory, to mention generally, who, according to the law of deſcent of the crown, was *heir of the body of Henry's ſiſter* the dowager queen of France at the *death of queen Elizabeth*, and who *now* ſtands

againſt the king and his miniſters; and that the biſhops held themſelves bound in duty to ſacrifice any part of it to the pleaſure and ſeparate intereſts of the crown; and after again adverting to it's being *felo de ſe* to the lords to poſtpone, and adding, that their loſs of appeals was *not the intereſt of the commons*, but *the inclination of the court*; lord Shafteſbury cloſed his impreſſive ſpeech, with moving to appoint a day for the hearing of Dr. Shirley's cauſe. How this great ſpeech was anſwered, is not handed down to us. But whatever might be the force of the reaſons on the other ſide, they failed of ſucceſs; and the reſult of the debate was a reſolution of the lords for hearing

ſtands in that ſituation. The prefacer, heretofore, has looked into the ſubject with a view to this. A long deduction would be requiſite to enable a correct and convincing ſtatement of theſe points. But the impreſſion of the prefacer is, that, according to the law of ſucceſſion to the crown, which in the caſe of two or more daughters prefers the eldeſt and her iſſue, *Lord Beauchamp*, ſon of Lady Catherine Grey by Seymour Earl of Hertford ſon of the protector Seymour Duke of Somerſet, was *heir of the body of Henry the Eighth's ſiſter the dowager queen of France when queen Elizabeth died:* and *Lady Anna Eliza Brydges*, only child and heir of the laſt duke of Chandos and juſt married to the Marquis of Buckingham's ſon Earl Temple, is *now heir of the body* of the dowager queen by deſcent from the ſame Lord Beauchamp. According to the ſame impreſſion, Algernon duke of Somerſet, of whom the *preſent Duke of Northumberland* is grandſon and heir, was heretofore *heir male* of the body of Henry the Eighth's ſiſter the dowager queen of France by deſcent from the ſame lord Beauchamp, according to the deſcent of *peerages* and of lands entailed on iſſue male. But this ſtatement muſt be underſtood to be ſubject to the exceptions formerly taken to the marriage of the dowager queen of France and Brandon Duke of Suffolk, and to the marriage of their daughter Lady Frances Brandon to Grey Duke of Suffolk Marquis of Dorſet, and alſo to the marriage of their daughter Lady Catherine Grey and the Earl of Hertford. Upon the ſuppoſition, that the exceptions taken to the ſecond of thoſe three marriages were founded, it would have the effect of throwing the heirſhip into the *Stanley* line of the dowager queen of France and her huſband the Duke of Suffolk; and ſo, as it is apprehended, *the preſent Duke of Bridgwater*, according to the law of ſucceſſion to the crown in the caſe of two or more female coheirs, would become heir of that dowager queen's body.

Dr.

Dr. Shirley's cauſe according to lord Shafteſbury's motion. There was a proteſt againſt it, indeed, by lord Angleſey. But it was founded on objections to the regularity of the courſe of proceeding and to the apparent want of merits in the caſe; and neither in the leaſt doubted the juriſdiction of the lords, nor in the leaſt favoured the ſuppoſition of any privilege of the commons, which ſhould exempt their members from the exerciſe.

THE news of this reſolution of the lords to proceed with Dr. Shirley's appeal ſoon (*o*) reached the commons. Their firſt ſtep on the occaſion (*p*) was a vote, that Shirley's proſecuting an appeal, in the houſe of lords, againſt Sir John Fagg a member of the houſe of commons, was a breach of their privilege; with a vote reſtraining Sir John from making defence. But though thus prompt in aſſerting their privileges, the commons acted, as if they thought it due to the urgency of publick affairs to poſtpone combating about the appellant juriſdiction: for they reſolved (*q*) to deſire a conference with the lords for avoiding occaſions of reviving the difference between the two houſes; and the conference taking place, it was propoſed to the lords (*r*) on the part of the commons, to put off the proceedings on Shirley's appeal for a ſhort time, in order that ſome bills of great importance to the king and kingdom might be diſpatched. But the lords, inſtead of acceding to this propoſition, declined taking the leaſt notice of it, and

(*o*) Journ. Comm. 13. Nov. 1675.

(*p*) Ibid. 15. Nov. 1675.

(*q*) Ibid. 18. Nov. 1675.

(*r*) The reaſons of the propoſition are in Journ. Comm. 19. Nov. 1675. and in 1. Chandl. Deb. Comm. 242.

inſtantly

inſtantly after returning to their houſe reſolved (*s*) to hear Dr. Shirley's appeal the next day; and as this ſeemingly contemptuous treatment of the commons appears to have been adopted without debate, it may be gueſſed, that lord keeper Finch and the biſhop Ward and thoſe of their way of thinking were too few to make any ſtand. That ſuch haughtineſs towards the commons ſhould quicken them into action againſt the upper houſe, is not ſurprizing. Informed of the diſdainful reception of their propoſal to ſuſpend the contention about appellant judicature, almoſt as ſoon as the lords had paſſed the offenſive vote, the commons inſtantaneouſly (*t*) anſwered the challenge of hoſtility, by reſolutions, not merely denying the juriſdiction of the lords over appeals from the courts of equity, but expreſſing that denial in the moſt indignant language. Upon this occaſion the firſt reſolution paſſed by the commons was thus expreſſed:

"WHEREAS the houſe hath been informed of *ſeveral appeals depending in the houſe of lords from courts of equity, to the great violation of the rights and liberty of the commons of England:* it is this day reſolved and *declared*, that *whoſoever ſhall ſolicit plead or proſecute any appeal againſt any commoner of England, from any court of equity, before the houſe of lords, ſhall be deemed and taken a betrayer of the rights and liberties of the people of England*, and ſhall be proceeded againſt accordingly."

IN order alſo, that this ſtrong reſolution might be notorious, it was reſentfully appointed by another reſolution of the com-

(*s*) Journ. Dom. Proc. 19. Nov. 1675.
(*t*) Journ. Comm. 19. Nov. 1675.

mons

mons to be affixed upon the door of the lobby of their houſe and in other conſpicuous places.

AFTER ſuch warm proceedings between the two houſes, the further ſitting of parliament became in a manner unmanageable. Accordingly this return of hoſtilities from the commons to the lords was almoſt immediately (*u*) followed with a prorogation of parliament: and the king not only prorogued ſuddenly without any ſpeech; but, as if he meant to convey to the publick mind, that he thought great length of time requiſite to reſtore good-humour between the two houſes, made the prorogation for nearly fifteen months, namely to the 15th of February 1676-7. But though the prorogation came thus rapidly, both houſes found time to make ſome further progreſs in the conflict thus recommenced. The commons on their part voted both Dr. Shirley and Sir Nicholas Stoughton into cuſtody for proceeding with appeals before the lords againſt members. On the ſame day alſo, the lords not only voted protection to the two perſons ſo ordered into cuſtody and to their counſel; but declared the paper containing the reſolutions againſt their judicature by the commons to be "illegal "unparliamentary and tending to the diſſolution of the govern-"ment;" and it was even attempted to carry an addreſs to the king for diſſolving the parliament. But the motion for ſuch an addreſs was loſt. However this was only by a majority of two; and the Duke of Buckingham and Lord Shafteſbury and twenty other peers entered a warm proteſt (*w*), juſtifying

(*u*) Journ. of both Houſes 22. Nov. 1675.

(*w*) See the Debate and Proteſt on this motion for diſſolving parliament in 1. Chandl. Deb. Lords 175. to 183.

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the negatived motion upon the ground of its being according to the antient ſtatutes to have frequent new parliaments, and of the danger of entruſting the repreſentatives of the people for the great length of time the then houſe of commons, which had already exiſted for about fifteen years, had been allowed to continue.

FROM ſuch a concluſion to the fourteenth ſeſſion of the long parliament of Charles the Second, it was ſcarce to have been expected, that the ſame parliament ſhould meet again, without either deſiſting on the part of the lords to exerciſe the appellant juriſdiction over equity, or a renewal of quarrel on the part of the commons. But ſo however it happened. At the expiration of the fifteen months, for which the parliament was prorogued, the king opened the ſeſſion with a ſpeech, which began with adverting to the unhappy miſcarriage of the preceding ſeſſion, and with earneſtly calling upon the two houſes to avoid all occaſions of difference. But this did not prevent the lords from receiving and hearing appeals from the courts of equity. Yet the commons wholly abſtained from interpoſing; and, as if they had repented of their former line of conduct, ſuffered the ſeſſion to paſs over without the leaſt interruption to the lords. This forbearance was the more ſtriking, becauſe early in the ſeſſion the attention of the commons was called to by a caſe, which almoſt neceſſarily led to ſome conſideration of the paſt diſpute about judicature. It was the caſe of Dr. Nicholas Carey. Not only had it been inſiſted in the houſe of lords by the Duke of Buckingham and Lord Shafteſbury and other peers the firſt day of the ſeſ-

ſion (*x*), that the long prorogation had legally the effect of diſſolving the parliament; but the ſame doctrine was circulated in various pamphlets. Of thoſe pamphlets, the principal (*y*) was underſtood to be really written by Lord Holles. But the oſtenſible author was a Dr. Nicholas Carey; and he was examined before the lords; and they fined him £1000. for contempt in not anſwering as to his knowledge of the writer, and committed him till payment (*z*). The day following this commitment, Lord Cavendiſh, afterwards Duke of Devonſhire, moved the commons to conſider of the manner of it (*a*). But though in the debate on this motion the reſemblance between this and Fitton's caſe before mentioned was pointed at, and Dr. Carey's being *fined* by the lords was open to great exception; and though ſome members preſſed the conſideration upon the houſe; yet at length the matter went off under the idea of obtaining better information: and as the caſe was not further noticed, it may be preſumed, that it was, becauſe there appeared ſuch averſeneſs to any preſent controverſy about judicature, and ſo much ſtreſs was laid on its being a caſe cognizable by either houſe under the head of *privilege*.

(*x*) 1. Chandl. Deb. Lords 187.

(*y*) It was intitled "Some Conſiderations upon the Queſtion, whether the "Parliament is diſſolved by its Prorogation for 15 Months," and the title-page referred to the ſtatutes of 4. and 36. E. 3. requiring a parliament to be holden *every year*.

(*z*) Journ. Dom. Proc. 16. & 21. Feb. & 1. March 1676-7.

(*a*) 4. Grey's Deb. 163.

THAT

THAT ſuch lukewarmneſs about the *appellant* judicature ſhould appear in the ſame houſe of commons, as had in the preceding ſeſſion gone ſuch decided lengths in reſiſting the claim of the lords, may at firſt appear very unaccountable. But upon looking more deeply into the ſubject, there will be found room for conjecturing motives of ſufficient weight to explain the myſtery. It is poſſible, that the commons were become jealous of the king's ſiding with them againſt the lords; and apprehenſive, leſt wreſting the appellant judicature from the hands of the lords ſhould too much augment the power of the crown, at a conjuncture, when, in reſpect of the current ſuſpicion, that the king and ſome of thoſe moſt in his confidence had formed ſchemes dangerous to the conſtitution, the true policy was rather to detract from that power. Indeed the certain conſequence, of forcing the lords to abandon their claim of appellant juriſdiction over equity, would have been a return of the ſame juriſdiction to commiſſioners nominated by the king; and their exerciſe would have been concluſive, unleſs the whole parliament ſhould interpoſe as the dernier reſort. Nor in this view of the caſe is it wonderful, that the leaders of the commons in the contention about appellant juriſdiction ſhould prefer the *whole* houſe of lords with *all* the judges to aſſiſt them, to *particular* judges commiſſionated by the king. Beſides there was recently loſt to the country that pattern of judicial ability learning and integrity lord chief juſtice Hale (*b*); and the proſpect of having a Scroggs and a Jeffries for chief juſtice of the king's bench, and as ſuch to preſide as

(*b*) Lord chief juſtice Hale died on Chriſtmas day 1676.---Scroggs became chief juſtice of the king's bench in May 1678, and Jeffries in Sept. 1683.

firſt commiſſioner of appeal, if commiſſioners of appeal were to be ſubſtituted for the lords, was not remote. Nor is it unlikely, that the commons were the more eaſily reconciled to not further obſtructing the claim of the lords, under the conſideration, of there ſtill remaining a right to reſort to the WHOLE *parliament* as the ſupreme appellant judicature of the kingdom, and of its being ſtill open to the commons to aſſert their claim of an equal ſhare in that judicature. Poſſibly alſo it might weigh ſomething with the commons, that, after all, ceaſing to diſpute with the lords about the appellant juriſdiction over decrees of equity, was in ſubſtance only allowing to the houſe of lords that power over decrees of equity, which in ſubſtance the lords already poſſeſſed without queſtion over judgments at law: for, where, excluſive of principle, was the ſubſtantial difference between exerciſing appellant juriſdiction over decrees in equity under a ſuppoſition of authority inherent to the peerage, and exerciſing ſuch a juriſdiction over judgments at law under commiſſion from the crown by a writ of error, which by long practice was become grantable of courſe? Upon the whole, therefore, the commons might perhaps deem it ſufficient for the publick intereſt, that they had ſecured a victory over the dangerous claim of the ariſtocracy to *original* juriſdiction: and might think that as to the claim of the lords to *appellant* juriſdiction over *equity*, however unfounded their claim might be in principle, it was immediately more an affair between the king and the lords, than between the lords and the commons; and that gaining a victory over the lords on this point would be only winning a prize for the crown under circumſtances, which made it more ſafe for the conſtitution, that the power ſhould continue with

with the peerage. In other words it ſeems, as if Lord Shafteſbury's eloquence had at length converted the commons, by alarming them into the conviction, that in the inſtance of the *appellant* juriſdiction over equity, however clearly the ſtrict doctrine of the conſtitution might be with them, their aſſertion of it was to ſtruggle againſt their own intereſt, and to prefer confidenee in nominees of the crown to confidence in the upper houſe; and conſequently, that ſucceſs in their purſuit would be to enlarge the ſphere of regal influence, at a time, when from the ambitious ſchemes of miſguided royalty the contraction of regal power was deemed the true policy.

It muſt be left to the opinion of the judicious reader to decide for himſelf, whether this be a juſt ſolution of this myſterious change in the conduct of the houſe of commons on the point of *appellant* judicature.

But whatever were the reaſons, which induced the change of diſpoſition in the commons, the effect of the change was leaving the lords in the quiet poſſeſſion of the object, which had been ſo warmly conteſted for with them in the former ſeſſion; and though the long parliament of Charles the Second was permitted to ſubſiſt for two other ſeſſions, yet the acquieſcence of the ſame houſe of commons continued in that unequivocal way, which imported, that the *appellant* juriſdiction of the lords was not intended to be again queſtioned.

Thus at length the ſtand made by the lords under the auſpices of Lord Shafteſbury's faſcinating perſuaſion, not only proved ſucceſsful; but proved ſo, as it ſeems, upon the very principle,

principle, which he made part of his argument, that is, the principle of its being more for the benefit of the commons to be overcome, than to be victorious.——Thus alſo the iſſue of the fight for *appellant* juriſdiction became in effect as much a decided victory to the lords, as the iſſue of the previous fight for *original* juriſdiction was in effect a victory to the commons. But there was this difference between the two victories. The point gained by the commons was carried againſt the united efforts both of king and lords. But the point gained by the lords ſeems at laſt to have been a voluntary conceſſion of the commons from a diſcovery, that if they prevailed the crown would be fixed in the exerciſe of a diſcretion equally formidable to both houſes. Nor was this the only difference. The victory of the commons appears to have been gained upon principles of the conſtitution approved by lord Hale, by lord Nottingham, by lord Vaughan, by almoſt the whole of Weſtminſter Hall except that champion of ariſtocratical power in its moſt exceſſive latitude, the memorable Mr. Prynne. But the victory of the lords appears to have been effected by the fear of the commons, that unleſs they by their acquieſcence ſanctioned what in principle ſome of the firſt lawyers of the country, as well as themſelves, held an unauthorized aſſumption by the lords, it would leave the crown and its miniſters with more power over appellant judicature, than from the want of confidence in the crown and ſome of its adviſers was thought to be compatible with the publick intereſt. So to be defeated was to the commons in the nature of a ſecond victory: not indeed over the lords, but over themſelves and their own pride, in reſpect of the arduouſneſs on the part of ſuch an aſſembly, to found a retreat

after

after being ſeemingly pledged to fight the battle out; and alſo over the ſecret views of the crown, if really there was any deep ſcheme of making the commons a mere inſtrument for increaſing regal influence under the maſque of preventing an unconſtitutional mode of adminiſtering appellant juſtice.—Had Prynne lived to be a witneſs to the victory of appellant judicature thus at laſt gained by the lords in following up his proud ſyſtem, it might have conſoled him for the tottering ſtate of ariſtocratical judicature when he expired. Perhaps he would even have been ſanguine enough to hope, that this ſtep towards repairing the breach in his ſtately edifice of lordly juriſdiction would ſoon lead to its entire completion, upon his immeaſurable foundation of boundleſs univerſality ſupremacy and omnipotence. But, as far as ſuch an expectation can be judged of from the experience of above a century, this would have been an over-reckoning in favor of his own ſpeculations.

Here it might be allowable to cloſe this long narration of conteſted judicature between the lords and commons: becauſe though there are ſubſequent occurrences deſerving attention; yet they are not ſuch, as to be eſſential to an account, of which profeſſedly the chief object is the ſtruggle about the exerciſe of *original* and *appellant* juriſdiction by the peerage in parliament; more eſpecially in *civil* caſes; and the reſult as to both of theſe branches of parliamentary judicature is now nearly if not wholly the ſame, as it was left at the point of time to which the ſubject is already proſecuted. Indeed at this moment the prefacer is too much exhauſted by the toil of dwelling ſo long upon one ſingle ſubject, and too ſtrongly urged

urged by profeſſional duties, and too much croſſed by the concourſe of adverſe currents, to proceed further upon anything like the large ſcale of inveſtigation, upon which he has hitherto attempted to conduct his readers through the long and dark maze of ſucceſſive ſtrifes for parliamentary judicature. His zeal to ſupply materials of information is unabated. But his condition will not endure the appropriation of himſelf for many hours longer to the purpoſe of the preſent publication. It is not the dryneſs of the ſubject, which limits him; for its conſtitutional importance would in his view more than compenſate. What ſtops him is that, which, where it attaches, peremptorily excludes choice and imperiouſly exacts conformity.

UNDER this explanation, the remainder of the preſent narrative of conteſted parliamentary judicature ſhall now be concluded, — firſt by adverting to ſome controverſial pieces which were written during the pendency or ſoon after the diſpoſal of the great caſe of Skinner and the Eaſt India Company on the exerciſe of original juriſdiction by the houſe of lords, and the ſucceeding one of Shirley and Fagg on their exerciſe of *appellant* juriſdiction over equity;—and then by referring to ſome relative matters and publications which have occurred ſince the adjuſtment from the effect of the laſt of theſe two leading caſes.

IN reſpect to controverſial pieces directly applicable to the two great caſes of *original* and *appellant* judicature, as far as the prefacer is at preſent informed, only two were printed at the time: and both were on behalf of the lords.—One

was

was "The Grand Queſtion," which applied to the conteſt between the two houſes on the *original* juriſdiction claimed by the lords. Of the author and contents of this piece, which is attributed to Lord Holles, and as it ſhould ſeem at leaſt for the moſt part compoſed by him, we have already apprized the reader. Connected with the juriſdiction part of lord Angleſey's "Rights of the Houſe of Lords Aſ-" ſerted," and of lord Holles's "Caſe ſtated of the Juriſdic-" tion of the Lords in Point of Impoſitions," to both of which pieces we have before adverted; the "Grand Queſtion" may, it is conceived, be properly deemed the whole of the defence of the claim of the lords to *original* juriſdiction in its utmoſt latitude from their own labors in the improvement of Mr. Prynne's previous collections. Here however, it may be fair to add, that there are in manuſcript ſome additional obſervations (*a*) on the ſame ſide, which were made by Pierpont Marquis of Dorcheſter, who died in 1680, and is ſaid to have much ſtudied the Engliſh law and conſtitution and to have been a bencher of Gray's Inn, and is alſo deſcribed as a moſt laborious ſtudier of other branches of ſcience (*b*). His obſervations are ſhort; but weighty, and ſuch as prove, that he underſtood the rare art of blending perſpicuity with compreſſion, of being brief on perplexed and large ſubjects without being obſcure.——The other printed piece is entitled, "The Caſe ſtated concerning the Judicature of the Houſe of

(*a*) The editor has a copy of them.

(*b*) See a full account of this learned and ſtudious nobleman, and of his writings and parliamentary ſpeeches, in Wood's Athenæ Oxonienſes.

"Peers in the Point of Appeals." It is uſually attributed to Denzell Lord Holles, and is moſt likely to have been written by him; though ſome give it to the Earl of Angleſey. It is mentioned in the title-page to have been printed in 1675. Moſt probably alſo it was actually publiſhed in the latter end of that year; for it is obſervable, that in Mr. Grey's Debates of the Commons for that day of November 1675, on which they voted the exerciſe of appellant juriſdiction by the lords over equity a violation of the rights and liberties of the commoners of England, Sir Thomas Meres is ſtated to have occaſionally quoted Lord Holles's *laſt book*, and Sir John Trevor is mentioned to refer to the 17th and 25th pages of the book, as when put together not only quite excluding the commons from all ſhare in the judicature of parliament, but as avowing that the lords act for the king as well as themſelves, and conſequently that they held the king's ſhare to be merely nominal; and the pages in the printed book, we are now giving an account of, exactly correſpond in point of contents. The plan of the book is ſimply this. It maintains two propoſitions. The firſt aſſerts the ſupreme appellant juriſdiction to be in parliament; well repreſenting, that parliament is the place for complaint and remedy, where inferior courts give a wrong *judgment*, or are guilty of *a wilful delay in giving no judgment* at all. As a ſort of recipe to quicken the induſtry and diſpatch of judges, to ſubdue their pride, and to remind them of their ſubordination and continual accountableneſs to parliament, it ſignificantly adds a reference to the parliament roll of 1. R. 2. no. 95. according to which the commons prayed, *that a parliament be yearly holden to redreſs delays in ſuits, and to end ſuch caſes as the judges doubt*

doubt of. The ſecond propoſition is, that this ſupreme appellant judicature of parliament is exerciſeable by the ariſtocratical part only; and in reaſoning on this part of the controverſy, the author moſt explicitly reduces the king to a *cypher* in this high buſineſs of judicial ſupremacy, and the commons into *nothing at all* in it. The former of theſe two propoſitions is the very point, which the commons, and thoſe who like lord Hale think with them, were ſo anxious to *realize*. But the ſecond propoſition, if it can be maintained, has the effect of deſtroying the firſt. Examined with each other, they ſeem ſo very unlike parts of the ſame argument as rather to appear direct oppoſites. It amounts to conceſſion in one breath, and to retraction of that conceſſion in the next. The firſt propoſition, with a ſuperabundance of generous candor, unreſervedly grants what cannot be denied to the commons, and which being granted is the ſubſtance of what is claimed by them. The ſecond inſinuates into the conceſſion ſuch limitations, as change its quality, and ſo in effect abſorb both king and commons into the ariſtocracy, and tranſmute the ſterling metal of the FULL and WHOLE *parliament* into a metalline of the *houſe of lords* ONLY. To reſort to ſuch a ſtriking inconſiſtence of propoſitions, is ſcarce to be accounted for, where a ſubject is handled by a profound writer, ſuch as Lord Holles certainly was, except upon the ſuppoſition of ſome invincible imperfection in the materials of argument. Sir Edward Seymour, anceſtor of the preſent Duke of Somerſet, and though without the family titles at the head of the elder branch of that noble family, was ſpeaker of the commons at the time this book of "The Caſe Stated" fell under the obſervation of that houſe; and he, according to Mr. Grey's

account, contemptuouſly ſpoke of the piece (*c*), *as an idle pamphlet*, which he believed *the houſe would diſpoſe of accordingly*. In the official ſituation of Sir Edward Seymour, this might be bearable: becauſe, as ſpeaker of the commons, it behoved him on their behalf to aſſume a high tone towards ſuch as he thought labouring to derogate from their rights. But it would not be fair to take the impreſſion of Lord Holles's book for the lords from ſuch a manner of treating it. In truth, if the book be faulty, it proceeded from the unmanageableneſs of the propoſition the author had to maintain, and not from his want of ability and learning, both of which throughout the performance are very conſpicuous.

UPON this view of the controverſial pieces, it may ſeem, as if all the writing was for the lords, and for them only, whilſt thoſe great fights about *original* and *appellant* juriſdiction were depending, and for ſome time after their concluſion. Hence alſo a ſuſpicion may ariſe, that the merits were too much againſt the commons to make it convenient to enter into minute reaſonings on their ſide of the queſtion.

BUT the real fact is, that, though no treatiſe was publiſhed for the commons at the time, much was written.

HAD only lord Hale's labours been exerted, the following treatiſe alone might perhaps be ſufficient to ſhew, that there was at leaſt as much exertion of induſtry, with as much profoundneſs of learning and as much power of argument, en-

(*c*) 4. Grey's Deb. 53.

gaged

gaged for the commons, as againſt them. But the following treatiſe, as will be preſently ſhewn, when we come to the account of lord Hale's writings on the ſubject, was not the ſingle effort made by him.

NOR were other profound reaſoners againſt the exceſſive claims of ariſtocratical judicature wanting.——In the collection of manuſcripts of the famous Mr. Petyt in the Inner Temple Library, there is a manuſcript diſcourſe which is profeſſedly an anſwer to "The Caſe ſtated concerning the Judi-"cature of the Peers in the Point of Appeals:" and it appears to have been written ſoon after the time of publiſhing that piece; and though in the form of a letter, it is full of extracts from and references to records, and contains a deep conſideration of the ſubject. Another more digeſted and more copious performance by the ſame writer, who probably was the learned Mr. Petyt himſelf, is in the poſſeſſion of a noble perſon (*d*), whoſe laudable pride is to oblige literary perſons with the moſt eaſy acceſs to the treaſures of his collection of printed books and manuſcripts. Both theſe diſcourſes are written in a maſterly way. The latter of them more particularly deſerves to be edited for public uſe. It is intitled "A DISCOURSE concerning the JUDICATURE in PAR-"LIAMENT, wherein the Arguments and Precedents of "ſeveral Books *lately* publiſhed, eſpecially thoſe in the CASE "STATED, are conſidered and fully debated." It conſiſts of eight chapters. The firſt chapter obſerves largely upon the *immateriality* to judicature in parliament of Mr. Prynne's au-

(*d*) The Marquis of Lanſdown.

thorities

thorities from ancient hiſtorians in ſupport of his dogma as to the late commencement of the commons. The ſecond chapter undertakes to ſhew, that judicature in parliament in the reigns of Edward the Firſt and Edward the Second was exerciſed; not by the houſe of lords; but by that *concilium ordinarium* of the king, which lord Hale in the following treatiſe ſo profoundly explains to exiſt both in and out of parliament, and which, as a *conſultive* body at leaſt ſtill ſo exiſts, being chiefly compoſed of the great officers of ſtate and judges, and whilſt parliament ſits being annexed to the houſe of lords. In the ſame chapter alſo it is endeavoured to ſhew, that the judicature ſo exerciſed by the *concilium ordinarium* was neither *univerſal* nor *unlimited*; and further that the right of the lords, to take cognizance of appeals from decrees in equity upon mere petition to themſelves, without any commiſſion or delegation from the king, cannot be juſtly inferred from their commiſſional juriſdiction under writs of error. The third fourth and fifth chapters contain a minute examination of the precedents urged by Mr. Prynne and others from the beginning of the reign of Edward the Firſt to the end of the reign of Richard the Second. The ſixth chapter is allotted to the reign of Henry the Fourth; and includes a critical examination of that parliament roll of his firſt year, which conſtitutes the grand ſanctuary of ariſtocratical claim to the judicature of parliament. In the ſeventh chapter all the precedents from the reign of Henry the Fourth to the eighteenth of James the Firſt are examined. The eighth and concluding chapter examines, beſides the *general* judicature claimed by the lords, what is urged for the *particular judicature* of the lords in the point of appeals from decrees in equity.——One other treatiſe againſt the claim of the houſe

houſe of peers, written upon the occaſion and ſoon after the conteſt between the two houſes about appellant judicature over equity, and as an anſwer to "The Caſe Stated" for the claim of the lords to that branch of parliamentary juriſdiction, is a manuſcript, which formerly belonged to the collections of the Hon. Roger North brother of the lord keeper Guildford, and conſtitutes part of a very obliging preſent of law manuſcripts to the prefacer from a reſpectable gentleman of the law in Norfolk (*e*). The object and turn of this latter manuſcript are very

(*e*) Daniel Jones of Fakenham in Norfolk eſquire. The volumes of law manuſcripts, which this gentleman was pleaſed to make a preſent of to the prefacer, as he underſtands, formerly belonged to Mr. Roger North. Beſides ſome reports and arguments of the lord keeper, with other collections, there are two volumes by Mr. Roger North himſelf. One is a common place of criminal laws under alphabetical heads. The other is a diſcourſe on the ſtudy of the law. The latter is entertaining as well as inſtructive. The following paſſage, as to the utility to law-ſtudents from converſing, includes ſome evidence of the fame of the *Finch* family for eloquence. "I think I next propoſed converſing, and mentioned the advice of Sir Henry *Finch*, to ſtudy all the morning and talk all the afternoon. I have heard ſerjeant Maynard ſay, law is *ars ſublativa*; meaning, that all the learning in the world will not ſet a man up in bar-practice, without the faculty of a ready utterance; and that is acquired by habit only, *unleſs there be a natural felicity of ſpeech, ſuch as the family of the* FINCHES *is eminent by.*"—The following extract, it being conſidered, that the writer was no friend to lord Hale, is a new proof, that Mr. Roger North could not help praiſing the great man he was ſolicitous to depreciate. "I confeſs, that there is a great difference in times, and according as the bar and bench are ſupplied with men of learning and good-nature. I have known the court of king's bench ſitting every day from 8 to 12, and the lord chief juſtice HALE managing matters of law to all imaginable advantage to the ſtudents, and in which he took a pleaſure or rather pride. He encouraged arguing when it was to the purpoſe, and uſed to debate with the counſel, *ſo as the court might have been taken for an academy of ſciences as well as the ſeat of juſtice.* In other times buſineſs has ſhrunk, the judges not appearing

very ſimilar to the two manuſcript diſcourſes before mentioned to be probably written by Mr. Petyt. From the manner of it's beginning, it was apparently intended as an anſwer to "The "Caſe Stated" as to the judicature of the lords in point of appeals. In the firſt page the author points out the largeneſs and univerſality of the judicature claimed for the lords in "The Caſe Stated;" attributing it to a kind of neceſſity from the ſcarcity of precedents to ſupport the particular claim of appellant juriſdiction over equity; and ſtrongly obſerving, that the foundation laid was ſo large, that poſſibly it might ſwallow up one of the beſt governments in the world. The author next proceeds, in a preliminary way, to the examination of the precedents in "The Caſe Stated;" and propoſes two things: namely, firſt to aſcertain the terms of the propoſition of judicature contended for on behalf of the lords; and ſecondly to ſtate in what perſons the *ſupreme judicial* power is lodged by the laws of the realm. He ſoon diſpatches the firſt of theſe points. But on the ſecond he is very laborious, ſo far as he goes. Unfortunately, however, after a diſcuſſion of about twenty pages, the manuſcript breaks off abruptly; either becauſe the diſcourſe was never compleated; or becauſe this copy of it is imperfect. So far as it extends, the diſcuſſion is very curious. The great aim of the author ſeems to have been to eſtabliſh, that the juriſdiction, claimed by the lords as their *antient* right, did in truth belong to and was exerciſed by the *ordinarium concilium* in parliament. For this purpoſe he conſiders, of whom that council conſiſted, the nature and extent of their

"pearing till eleven in the morning, and then being very ſhort and haſty in their "diſpatches, ruling things without debate, and not enduring their own rules to "be diſputed."

juriſdiction,

juriſdiction, the manner of exerciſe, the decreaſe of their power, and how that happened. Who was the author of this curious fragment, is not ſtated. But there is ſome probability, that it came from lord keeper North himſelf. This conjecture is not merely grounded on Mr. Roger North's having poſſeſſed the manuſcript. It has much ſtronger foundations. The ſentiments, it contains, accord with thoſe attributed to the lord keeper in his life written by Mr. Roger North. By the ſame life alſo the lord keeper appears to have written a treatiſe to ſhew, that the *magnum concilium* in parliament was antiently not the *peerage*, "but all the officers of ſtate and ſuch "as the king ſhould call to ſerve in that capacity; and that "the *placita in parliamento* or pleas in parliament came before "the great council juridically, and not before the peers." To this Mr. Roger North adds, "that the juriſdiction, which "is the king's, is executed by the peerage;" that the "council remains only in the capacity of aſſiſtants; and that "ſo it is like to continue." This is in a great degree, if not entirely, the ſubſtance of the doctrine of this imperfect manuſcript. Beſides this, the manuſcript includes a very profound explanation on the *judicium parium* in parliament, to evince the diſtinction between the *judgment or verdict of the peers* and the *judgment of the court*, which exactly correſponds with Mr. Roger North's account of the lord keeper's writing on the occaſion of lord Danby's impeachment to prove the neceſſity of a *high ſteward* for trial of peers in parliament as well as for trial out of it.

As to the matters, which have occurred ſince the concluſion of the great conteſted caſe of appellant juriſdiction, the prefacer

is not prepared to enter fully into ſuch a conſideration: and it happens not to be neceſſary for the great purpoſe of the preſent narrative; becauſe as on the one hand the lords have ceaſed to inſiſt on their claim of *original* juriſdiction; ſo the commons, except in one ſingle inſtance, have acted, as if they had ſtudied, how to be wholly oblivious of having ever diſputed the judicature of the lords in the point of *appeals*.

But ſome few notices, however ſlight, may be not wholly uſeleſs.

In the firſt place, the caſes on the impeachments of lord Danby and of the five Roman Catholic lords in 1678, and of Fitzharris in 1680, well deſerve attention. They cauſed the agitation of various important points relative to parliamentary judicature. Particularly it became neceſſary to conſider, the effect of a diſſolution of parliament on impeachments and other judicial proceedings; how far the biſhops are intitled to vote on trials of peers in capital caſes and on queſtions previous to trial; whether the king's pardon is pleadable to an impeachment by the commons (*f*); whether the king's appointment of a high ſteward is eſſential to the trial of a peer upon ſuch impeachments; and whether a commoner is triable by the lords on impeachment for a capital offence; and alſo whether the proceeding upon an impeachment of the commons for

(*f*) See lord chancellor Nottingham's moſt learned and able "Treatiſe on the "King's Power of granting Pardons in Caſes of Impeachment," which was publiſhed in 1791 from a manuſcript in Lord Lanſdowne's Library, and was firſt reſorted to for the purpoſe of a late impeachment in conſequence of the prefacer's recollection of having formerly ſeen the manuſcript.

treaſon

treaſon is poſtponable by the lords on the ground of the king's having directed an indictment at common law. Theſe are all certainly intereſting conſiderations. But, except the queſtion as to the neceſſity of the king's appointing a high ſteward on the trial of peers in parliament, they rather touch the *manner* of exerciſing the judicature of parliament, than relate to the *right* of exerciſe. Yet probably the learned writings by Lord Holles Biſhop Stillingfleet Mr. Hunt and others, about the ſhare of the epiſcopal order in parliamentary trials, may occaſionally and incidentally include the latter conſideration.

In the next place it may be proper to recollect, that the circumſtance, of there being no parliament between March 1681 and the death of Charles the Second, diſabled all appeals to the lords from decrees in equity for four or five years. Hence there originated an attempt by a Mr. Walter Williams, a gentleman at the bar, who thought himſelf aggrieved by a decree of lord Nottingham, to petition the king, either to rehear the cauſe in his own proper perſon, or to commiſſionate others. But it ſeems, that the king was adviſed not to grant this petition, under the impreſſion of there being no relief againſt chancery decrees, but by the lords in parliament. Not ſatisfied with the refuſal, Mr. Williams publiſhed a treatiſe with the title of Jus Appellandi ad Regem Ipsum a Cancellaria (*g*), conſiſting of two parts, and aſſerting the right of the king to grant a commiſſion for examining decrees in equity in the intervals of parliament. The book is certainly learned and deſerves being read. But it ſuſtains the king's

(*g*) See ſome notice of the book before in the note to p. 39.

right upon a very high tone of prerogative. Therefore had it been publiſhed before the great conteſt about the appellant juriſdiction of the lords, it would probably have ſufficed of itſelf to cool the ardour of the commons in fighting the point of appeals. But the caſe did not end here: for after the Revolution Mr. Williams appealed to the lords. They diſmiſſing his appeal, he in a ſubſequent ſeſſion petitioned for a rehearing; and printed a paper of authorities and precedents to ſhew, that *error in parliament may be rectified in a ſubſequent ſeſſion, or even in another parliament*; and in this paper, the diſmiſſal of his former petition of appeal is imputed to his not having been able to obtain a hearing againſt his opponent judge Gregory, who was then a member of the commons, without leave of that houſe. To this paper of precedents and authorities there appears to have been an anſwer (*b*), examining each in a very full manner. The reſult, after another renewed petition, was an affirmance of the decree complained of with coſts (*i*). Still not at reſt, Mr. Williams wrote a new treatiſe on appellant juriſdiction. It was never printed. But the manuſcript of it exiſts, and now belongs to a barriſter (*k*); with whom the

(*b*) Manuſcript *penes editorem*.

(*i*) Journ. Dom. Proc. 4. Jan. 1693-4.

(*k*) Henry Jodrell Eſquire.—The title of the manuſcript is, "SALUS REGIS "ET POPULI, the Safeguard of King and People; An Account of the Ways "and Means of being relieved againſt Erroneous and Unjuſt Decrees in Chan- "cery, and of the Antient Manner of Proceeding upon Writs of Error, whereby "may appear, which is the Regular Way, in order to ſecure the Crown from "Diſinheriſon and the People from the Injuſtice of Arbitrary Power, of which it is "conceived they are in Danger: Collected from Records and the beſt Authorities "in

the prefacer has the honor of being intimate. It is a very angry performance. Yet like the writer's former works it is both able and learned. It aſſerts the dernier reſort of judicature to be in the king lords and commons, but notwithſtanding this doctrine; which, though not very unobvious to a really conſtitutional lawyer, did not as it ſeems quite fully occur to the author when he firſt wrote; the high ſtrain of prerogative is occaſionally conſpicuous.

" in Law. By Walter Williams of the Middle Temple Eſquire."——The full uſe of the volume, containing this amongſt other manuſcripts, is not the only favour of the kind the prefacer has experienced from Mr. Henry Jodrell. For ſeveral years paſt the prefacer has been indulged by Mr. Henry Jodrell with more poſſeſſion and uſe of the valuable manuſcript equity reports by his father Henry Jodrell eſquire, for the firſt ten years of lord chancellor Hardwicke's time, than he allows to himſelf. Mr. Henry Jodrell the father was ſolicitor general to Frederick Prince of Wales, and though young at the time of his death had attained to the firſt claſs of eminence and practice at the chancery bar. He was the particular aſſociate and friend of that modern conſtellation of Engliſh juriſprudence, that elegant and accompliſhed ornament of Weſtminſter Hall in the preſent century, the Honorable Charles Yorke Eſquire:—whoſe ordinary ſpeeches as an advocate were profound lectures;—whoſe digreſſions from the exuberance of the beſt juridical knowledge were illuminations;—whoſe energies were oracles;—whoſe conſtancy of mind was won into the pinnacle of our Engliſh forum at an inauſpicious moment;—whoſe exquiſiteneſs of ſenſibility at almoſt the next moment from the impreſſions of imputed error ſtormed the fort of even his highly cultivated reaſon, and ſo made elevation and extinction cotemporaneous;—and whoſe prematureneſs of fate, notwithſtanding the great contributions, from the manly energies of a Northington and the vaſt ſplendor of a Camden, and notwithſtanding alſo the acceſſions from the two rival luminaries which have more latterly adorned our equitable hemiſphere; have cauſed an almoſt unſupplyable interſtice in the ſcience of Engliſh equity. To have been ſelected as the friend of ſuch a man, was nearly *inſtar omnium* to an Engliſh lawyer. Even to be *old enough*, as the prefacer confeſſes himſelf to be, to have received the impreſſions of Mr. Charles Yorke's character as a lawyer, from the frequency of hearing his chaſte delicate and erudite effuſions in the diſcharge of profeſſional duty, is ſome ſource of mental gratification.

AFTER

AFTER theſe writings of Mr. Williams againſt the appellant juriſdiction of the lords it may be proper to recollect the caſe of Mr. Charles Knollis, who claimed to be Earl of Banbury by heirſhip. Having killed a perſon in a duel, and being therefore indicted in 1692 for murder by the name of Charles Knollis Eſquire, he pleaded in the king's bench a miſnomer in abatement; namely, the letters patent of 1. Cha. 1. creating his anceſtor William Knollis, who was Viſcount Wallingford by creation in the preceding reign, Earl of Banbury, with limitation to the heirs male of his body: and he alſo pleaded the deſcent of the earldom upon him as grandſon and heir male of the body of the patentee. To this the attorney general, inſtead of taking iſſue upon the plea, replied, that Mr. Charles Knollis had by petition to the houſe of lords claimed the earldom and to be tried by his peers, and that the lords had made an order diſmiſſing his petition. Upon this replication it was demurred. Thus the king's bench was put to decide upon the effect of the order of the lords in point of concluſion; that is, whether it ought to operate as the *judgment* of a court competent by their deciſion to eſtop the claimant from aſſerting his claim to the peerage elſewhere. It was a delicate ſubject for the court; and they appear to have ſo conſidered it, and to have had it upon their hands for ſo conſiderable a time, as cauſed the houſe of lords to inquire into the reaſon. At length the court unanimouſly decided againſt the ſufficiency of the replication; and lord chief juſtice Holt more particularly delivered his ſentiments on the occaſion in a very courageous and learned manner. The great principle of the deciſion was, that the order of the lords was not a *judgment*. The reaſons, upon which the quality of a judgment was denied to their order, were not a little pertinent to the conteſt about parliamentary

mentary judicature: for they included the poſition, that the houſe of lords is not a court of *original* juriſdiction; and that even their *appellant* juriſdiction over *law*, as being founded on the king's writ of error, is *derivative* from the crown. The principle therefore of this noted deciſion is, not only a direct denial of one great portion of the juriſdiction claimed by the lords; but founds another great portion of their judicature, upon a title far leſs proud and independent than themſelves, or at leaſt the chief writers in ſupport of their pretenſions, have uſually plumed themſelves upon. At the ſame time, it might ſeem partial, not to mention, that the court of king's bench, thus diſowning the lords as an *original judicature*, and thus as it were humbling them as an *appellant* one over law into royal commiſſioners, was exceedingly bountiful in ſome other reſpects. At leaſt the printed notes of lord chief juſtice Holt's argument ſo ſtate the matter: for according to them, he treated the lords as if they were the ſupreme judicature of the kingdom, and as if the ſole judicature of parliament was ſubſtantially and in point of actual exerciſe in their body. The manly character of lord chief juſtice Holt renders it difficult to ſuppoſe, that ſuch language could come from him, to pacify thoſe to whom it was plain the court's judgment would be offenſive. Yet if he did ſtate the lords to be the *dernier reſort*, and to have the *ſole* judicature of parliament, and in ſo doing meant anything beyond that *verbiage* of complimentary ſtile, which even in his time had ſomehow or other grown into a ſort of faſhion amongſt thoſe who addreſſed or ſpoke of them, it may not perhaps be too much to ſay, that ſuch vaſt conceſſion was, not only very *extra-judicial*, but very oblivious both of the recent opinions of lord chief juſtice Hale and others of the firſt

deſcription

deſcription of Weſtminſter Hall, and of the recent conteſts between the two houſes about judicature. Nay, it may be doubted, whether this extra-judicial language, if it was really meant to convey an opinion, was not of a tendency deſtructive of the very principle, upon which the judgment of the court was founded. In that view alſo the deciſion would loſe ſome little portion of its weight. However it ſhould ſeem, that even the houſe of lords did not ſo conſider this manner of mentioning them. Had they ſo done, it would ſcarce have happened, that they ſhould have ſeriouſly complained: for in that view, if their judicative power was depreſſed, it was alſo exalted. But in fact they treated the whole proceeding as if it was very hoſtile to them. Before the judgment, they ordered the attorney general to give an account of the buſineſs; and upon his report ordered the judges of the king's bench to attend. After the judgment, the attorney general was called upon in like manner, and the lords ordered the king's bench record to be brought before them (*kk*). It appears alſo, that lord chief juſtice Holt was called upon to give the reaſons of the judgment to the lords; but that he reſolutely refuſed yielding to this *extra-judicial* queſtion; and that after ſome threats of further ſteps the buſineſs was dropped (*kkk*).

It next occurs to advert to the curious caſe of Bridgman againſt Holt, which was brought before the lords in 1693, and in a manner made the judges of England opponents of an *original* juriſdiction in the houſe of lords.——In its beginning

(*kk*) The caſe is reported in 1. L. Raymond and ſeveral other books.

(*kkk*) For this note, ſee the end of this preface.

it

it was a conteſt on the right of official patronage between the grantees of the crown and the grantee of the chief juſtice of the king's bench. Mr. Bridgman, as ſurviving grantee under letters patent *in truſt* for the firſt Duke of Grafton, claimed the office of *chief clerk of the king's bench* on the CIVIL ſide, againſt Mr. Rowland Holt, who was in poſſeſſion of the office under an appointment of his brother lord chief juſtice Holt. To recover the office a writ of aſſize was brought in the king's bench by Mr. Bridgman, on behalf of the Ducheſs of Grafton, who under her huſband the firſt Duke was become beneficially intereſted. It was a delicate buſineſs to have the trial of ſuch a caſe at the bar of the king's bench, the chief juſtice being intereſted to ſupport his own grant. But ſo it was. When the trial came on, the chief juſtice was not on the bench; but he ſat upon a chair uncovered near the counſel for his brother and grantee. Upon the trial, the record of a ſtatute of Edward the Third was relied on for the truſtee of the Ducheſs of Grafton, as ſufficient proof of the king's right of nomination. The anſwer on the other ſide was, that the ſtatute applied to the *clerk of the crown* in the king's bench, and not to the *chief clerk on the* CIVIL *ſide*, with a great weight of evidence of long practice for the chief juſtice's right of nomination. The three puiſne judges, who were Dolben Gregory and Eyre, the only judges ſitting, did not think the ſtatute ſufficient for the purpoſe of the plaintiff, and ſo inſtructed the jury. A bill of exceptions was tendered to the judges. But they declined ſealing it, under ſome objection to the correctneſs of the ſtatement in point of fact. A verdict was given for the nomination of the chief juſtice; and judgment followed accordingly. Upon that there was a

writ of error to the lords. But beſides that, there was a petition to the lords from the Ducheſs of Grafton and her truſtee Mr. Bridgman, complaining of the judges for not ſealing the bill of exceptions, and making it a part of the record, as is required by Weſtminſter the ſecond chap. 31. There was ſome difficulty as to the anſwer of the judges to this petition of *criminal* complaint. But as *finally* put in their anſwer, ſo far as is material to the point of the judicature of the lords, was to this effect. It repreſented the petition to be a complaint in the nature of an *original* ſuit, charging the judges with a *crime*, and *ſo altogether improper for the examination of the lords, as not being any more triable by them than every information for breach of any ſtatute law*, "which mat-"ters are by the common law and juſtice of the land, of "common right to be tried by a jury." It alſo objected the incompetency of the lords to aſſeſs *damages*, which, if injury was done in the caſe, were the proper redreſs for breach of the ſtatute of Weſtminſter the ſecond. At the ſame time the judges offered to waive their privilege as aſſiſtants to the lords, and to appear *gratis* to any ſuit againſt them in Weſtminſter hall. But yet they reminded the lords, of the oaths they the reſpondents were under to do juſtice, and of the danger of impoſing reſtraint upon them. Then they referred to the 25th of E. 3. chap. 4. the 28th of E. 3. chap. 3. and the 42d of E. 3. chap. 3. as ſtatutes inconſiſtent with ſuch an original proceeding before the lords. The anſwer concluded, by ſolemnly and firmly inſiſting, that it was a caſe of *original* complaint, triable according to the courſe of the common law, and not conuſable by the lords without a ſubverſion of the trial by jury; and by relying upon the ſtatutes they

they referred to; and upon "the common right they the judges "had of freeborn people of England in bar of the petitioner's "any further proceeding." A more ſtriking caſe, than this of three judges moſt earneſtly and explicitly treating the exerciſe of juriſdiction by the lords on a petition of *original* complaint as an invaſion of the right of Engliſhmen to the courſe of the common law, as a ſubverſion of the trial by jury, and as a violation of the ſtatutes enforcing thoſe rights and that mode of trial, cannot well be imagined. Probably the caſe in that reſpect is not to be paralelled in the hiſtory of our law. The caſe was argued at the bar of the lords for ſeveral days. What impreſſion was made by the argument may be gueſſed at by the reſult, which was a reſolution of the lords *giving leave to the Ducheſs of Grafton and her truſtee to withdraw their petition*. If any thing was wanting to compleat the victory of the commons in the caſe of Skinner, over Mr. Prynne, Lord Holles, and the *original* juriſdiction of the lords, this caſe ſeems to have fully ſupplied the defect: for at leaſt impliedly it appears to ſhew, that at length even by the confeſſion of the lords themſelves their claim of original juriſdiction is too palpably unconſtitutional to be ſupportable. This caſe is, as it were, the clamour of Weſtminſter Hall itſelf, through the judges, to drown the voice of ariſtocratical pretenſion to be a judicature for *original* cauſes, and to give the finiſh to the extinction to ſuch a claim (*kkkk*).

(*kkkk*) This ſingular caſe in a *general* way is largely but imperfectly reported in Shower's Caſes in Parliament 111. But the prefacer has a *manuſcript* report of the *particular* argument of each of the counſel, including the occaſional queſtions and remarks from the peers. The detail of the proceedings of the lords are in their Journals for 24. Nov. & 1. 3. 7. 15. 16. 18. 19. 20. & 22. Dec. 1693.

Unfortunately in point of example, this caſe was a little tarniſhed by originating from a ſtruggle for the right of patronage over a very profitable office; which, though materially concerning the adminiſtration of publick juſtice, and therefore within the policy of the ſtatute of Edward the Sixth againſt ſale of offices, was, till the check from the awful admonitions of lord chancellor Macclesfield's impeachment, too often treated as a truſteeſhip for the patron's family.

We are next called upon to look to a publication of the famous judge Sir Robert Atkyns in 1699 againſt the juriſdiction of the lords over appeals from decrees of equity. Previouſly indeed, excluſive of the continuance of the exerciſe of appellant juriſdiction under writs of error over judgments at law, and on the ſuppoſition of *inherent* right over decrees by courts of equity, there occur ſome proceedings of the lords on impeachment, with the important caſe of the Ulſter Society's appeal againſt the biſhop of Derry in 1689 from a decreee of the Iriſh houſe of lords reverſing a decree of the chancery of Ireland. But the former relate either to the *effect of diſſolution of parliament on impeachments*, or to the points, *whether the lords could try a commoner on impeachment for miſdemeanor* (*l*); and as to the Iriſh appeal caſe, the *appellant juriſdiction for* IRELAND is not meant to be here conſidered, being purpoſely reſerved for ſeparate conſideration at ſome future time.

With reſpect to Sir Robert Atkyns's publication there ſeems to have been ſomething particular in the cauſe of it.

(*l*) Caſe of Sir Adam Blair and other impeached commoners. Journ. Dom. Proc. 26. & 27. June & 2. July 1689.

Sir

Sir Robert had been many years one of the moſt diſtinguiſhed of the long robe in the houſe of commons. As appears alſo from the preceding ſtatement, he was amongſt thoſe, who were active againſt the claim of the lords in the great caſe of *original* juriſdiction. Between the concluſion of that caſe and the ſubſequent conteſt about *appellant* juriſdiction, he had been made a judge of the common pleas. In 1679 he reſigned that office. But he did not become indifferent about the law of the country, as eminently appears by his efforts on the law of treaſon for the unfortunate and moſt amiable Lord Ruſſel, and by his able and zealous writings on various great legal and conſtitutional ſubjects between his ceaſing to be a judge and the end of the year after the Revolution. It appears alſo from the tendency of his writings, that Sir Robert was not ambitious to be claſſed amongſt thoſe, who lend their law learning to intoxicate and enervate the crown by flatteries, or to accommodate its miniſters by juſtifying exorbitances (*m*). At the Revolution he was made chief baron

(*m*) The nature of Sir Robert Atkyns's writings, on occurrences ſubſequent to his retirement from the bench and previous to the Revolution, is full evidence of this. One of them was an argument to prove the *inviolability and unaccountableneſs* of the ſpeaker of the commons or any of its members in *Weſtminſter-Hall*, for ſpeeches or tranſactions in Parliament; and in that he took occaſion to aſſert the antiquity of the houſe of commons againſt their arch-enemy Mr. Prynne. In another he endeavoured to ſtop the current of *prerogative encroachment on the eccleſiaſtical part of our conſtitution*, and for that purpoſe to evince the illegality of a commiſſion which king James the Second had granted for eccleſiaſtical cauſes. In a third treatiſe he wrote profoundly againſt a *diſpenſing power* in the crown; expoſing its pernicious tendency; tracing its origin to papal corruptions; evincing the irreconcileableneſs of a *prerogative diſpenſing power* with the limited nature of our monarchy; and in a poſtſcript anſwering lord chief juſtice Herbert's vindication of the judgment in Sir Edward Hale's famous caſe of diſpenſation of the teſt act in favor of the Roman Catholics.

of

of the exchequer: and he was ſpeaker of the houſe of lords for about three years afterwards. But in 1695, when he was in his ſeventy-fourth year, he reſigned his office of chief baron, and retired from all profeſſional engagements. Yet ſtill he was active as a writer upon law. A ſhort time after his retirement from office he publiſhed, "An Enquiry into "the Juriſdiction of Chancery in Cauſes of Equity," the aim of which was to attribute certain exceſſes to that high court, to have them corrected, and to releaſe the common-law courts from that, which Sir Robert, following and vindicating lord Coke, conſidered as an unconſtitutional dependency upon the court of chancery. For theſe purpoſes Sir Robert propoſed, that the courts of common law in Weſtminſter Hall ſhould be declared by parliament to have the power of iſſuing *prohibitions* to reſtrain chancery within due bounds. Had this effort to revive lord Coke's doctrine been ſucceſsful, the ſuperior courts of common law would now have a controuling power over the court of chancery by writ of *prohibition*, inſtead of having its ſuitors ſo ſubject to interruption from the chancery's writ of *injunction*, as in point of effect to make the king's bench itſelf in ſome degree ſubſervient. This work Sir Robert dedicated (*mm*) to the *lords*, over whoſe

(*mm*) Sir Robert begins his dedication, with preſenting to the lords his treatiſe, with the ſtate of his own particular caſe with a Mrs. Tooke annexed, as a ſubject properly belonging to them, becauſe "relating to that ſupreme juriſdiction in caſes "of appeals from courts of equity, which is EXERCISED by" their "lordſhips *as* "*being the laſt reſort.*" In a ſubſequent part there is the following paſſage. "If what he hath written ſeem too free and plain, he hopes he is excuſable. The "neceſſity and importance of the caſe ſo requires. And he may be allowed a "more than common zeal for the commons, he having ſat ſo many years as a "judge in ſeveral of the courts in Weſtminſter Hall: *he himſelf and his three* "*immediate*

whoſe houſe he had ſo recently preſided as ſpeaker (*mmm.*) In 1699 when he was *almoſt eighty* he publiſhed a treatiſe upon "The True and Antient Juriſdiction of the Houſe of "Peers." This he addreſſed to the *houſe of commons* in the form (*n*) of a petition. It is a kind of continuation of his treatiſe on the Juriſdiction of Chancery in Cauſes of Equity: for as that complains of the encroachments of chancery, and illuſtrates the complaint by a decree againſt himſelf, ſo this not only controverts the appellant juriſdiction of the lords over equity, but complains of their exerciſe in his own particular

"*immediate anceſtors having been of the profeſſion for near two hundred years and* "*in judicial places*, and through the bleſſing of Almighty God having proſpered "by it; his greatgrandfather living in the time of king Henry the Seventh."

(*mmm*) To this piece there was annexed his caſe upon his appeal againſt a decree made by Lord Somers in Trinity Term 1694 preferring the *ſeparate maintenance* of a Mrs. Tooke to Sir Robert's claim as a mortgagee of her huſband. The conveyance to the truſtee for the ſeparate maintenance was prior in date to Sir Robert's mortgage, and in point of notice reached him before his becoming mortgagee. But he inſiſted, that the conveyance for ſeparate maintenance was void *at law* as *fraudulent* by the ſtatute of 27. Eliz. c. 4. and that he being a *purchaſer for a valuable* conſideration ought not to be reſtrained by *equity* from uſing his *legal* title. The point was certainly one of nicety; and the deciſion of Lord Somers as a precedent is material to be known. It is not in any printed report, as the prefacer believes; nor can he find out at preſent, whether the decree ever came before the houſe of lords. Both the treatiſe and the caſe annexed are very ſcarce, and ſome copies of the former are without the latter.—— In this *chancery* cauſe Mrs. Tooke was plaintiff and Sir Robert was defendant. But he had filed a bill of foreclоſure againſt her huſband and her in the *exchequer*, and then not informed of the inſufficiency of the eſtate had admitted the ſeparate maintenance. The exchequer decreed in his favor. But Mrs. Tooke appealed to the lords, and they remitted the cauſe to the exchequer for rehearing on the proofs in *both* cauſes. See Journ. Dom. Proc. 9. 18. & 27. Jan. & 1. 11. 13. 15. 16. & 24. Feb. 1691-2.

(*n*) Sir Robert Atkyns's Treatiſe on the Juriſdiction of the Houſe of Peers being

ticular caſe. Both are written with great learning, and notwithſtanding the vaſt age of the author, with great energy. Moſt certainly it ſomewhat detracts from the authority of theſe

being very rare, it may not be unacceptable to the reader to have the prefixed petition at length. It is as follows:

" To the Right Honourable the Knights Citizens and Burgeſſes of the " Houſe of Commons in Parliament aſſembled,

" The humble Petition of Sir Robert Atkyns Knight of the Bath,

" Sheweth,

" That your petitioner, in the ſeveral publick employments he hath " undergone, hath had more than ordinary occaſion of obſerving the increaſing " juriſdiction of the courts of equity in this kingdom; and how the common " law, the birthright of every Engliſhman, hath been, and ſtill is, every day " more and more invaded by it. He hath taken the pains to collect many of thoſe " continual complaints from time to time made by the commons of England in " parliament againſt the exerciſe of that new juriſdiction in the very beginning " of it. And your petitioner hath great reaſon alſo to take notice of the exer- " ciſe of the juriſdiction of appeals from the proceedings of thoſe courts; and " humbly preſents this honourable houſe with what he hath collected in order to " your ſervice therein. Your petitioner craves leave to make uſe of that free- " dom which belongs to every Engliſhman, to tender you a complaint againſt " ſo publick and ſpreading a grievance. He doth not appeal, nor complain of " any thing that merely concerns himſelf. He only ſubjoins a caſe, wherein him- " ſelf was a party, merely as an inſtance of the large exerciſe of a power againſt " the known and fundamental rules of the common law as he conceives. That " caſe of your petitioner happened very lately in the chancery. But it is gene- " rally known in the courts of Weſtminſter Hall, that as your petitioner had oc- " caſion, he hath for *many years* frequently and publickly in his ſtation inveighed " againſt the *encroachment of courts of equity and that late courſe of appeals.* On " behalf of the whole kingdom he humbly offers his ſervice, and lays before you " what he hath obſerved and collected upon this ſubject *after near threeſcore years* " *experience.* And ſubmits all to your wiſdom, to proceed in providing juſt re- " medies. And your petitioner ſhall ever pray, &c.

" ROBERT ATKYNS."

For

theſe pieces, that they in ſome meaſure originated from diſ-ſatisfaction at deciſions againſt himſelf; and that at leaſt in

 the

For the ſame reaſon perhaps a ſpecimen of the treatiſe itſelf may be acceptable. The following paſſages, beginning with a remark upon the probable reaſon of Lord Holles's being led into extravagant notions of the unlimited juriſdiction of the lords, are accordingly extracted for the reader's uſe from the third page of it.

" He hath been led into theſe opinions, I fear, by ſome late over-zealous wri-" ters, out of too fond and forward zeal to depreſs the houſe of commons in the " *late* exorbitant power, which they took upon them in the *late times*. In order, " I ſay, to the decrying of their uſurped power, thoſe writers thought they could " never ſufficiently exalt the power of the lords to overbalance that of the com-" mons.

" And it may perhaps be uſeful by the way to take notice of the ſtrange revo-" lution that in the late times happened to the government of this nation.

" 1. Our kings began firſt to ſtrain prerogative too high upon the ſubject.

" 2. Both houſes of parliament thereupon joined together in uſurping upon the " regal power.

" 3. After ſome ſhort time, the *late* houſe of commons, by the help of their " army, laid aſide the houſe of lords. *Sic, cum ſole perit, ſyderibus decor.*

" 4. After ſome time again a leſſer part of the houſe of commons excluded the " greater part.

" 5. And theſe their own army overlop, as being but the fragment of that " houſe.

" ——————— *Sic Medus ademit*
" *Aſſyrio; Medoque tulit moderamina Perſes.*
" *Perſen ſubjecit Macedo, ceſſurus et ipſe*
" *Romano.*"

This

the form of dedication, himſelf had appealed to the very forum whoſe juriſdiction he controverts, and in language which treats them as the *laſt reſort*. Indeed Sir Robert, who could not but be aware of this opening to remark upon him, endeavors in his petitionary addreſs of the laſt of the two pieces to the commons, to obviate the objection in ſome degree: for he repreſents to the commons, that his own caſe was RECENT, "but that it was generally known in Weſtmin-"ſter Hall, that as he had occaſion he had for MANY YEARS "*frequently and publickly in his ſtation* inveighed againſt the "*encroachments of courts of equity* and that *late courſe of* "*appeals.*"

SIR Robert Atkyns's treatiſe againſt the appellant judicature of the lords brings us to the beginning of the preſent century: and what has ſince happened in the way of controverſy about the great points of the judicature of parliament lies within a narrow compaſs.

ON the impeachment of Lord Somers and other peers in 1701, which were the next ſubject of judicative controverſy between the two houſes, various points of difference aroſe about the manner of proceeding upon impeachments by the commons. The commons claimed to have a diſcretion, as to *the time of exhibiting articles* and *the time of replying to the anſwer of the impeached*; and to have *a right of being con-*

This is no mean epitome of the chief of the political tranſitions of which Sir Robert Atkyns had himſelf been an eye-witneſs; and his poetical application of the *quatuor ſumma imperia* of the world, though not reaching to the laſt of the five changes adverted to in our government before the Reſtoration, is a proof, that his claſſical memory was alert even at the age of almoſt *fourſcore*.

ſulted

ſulted as to the time of trial. It was alſo inſiſted by the commons, that *an impeached peer ought not to ſit and vote on the trial of other peers impeached of the ſame crime:* that *a peer under trial ſhould not ſit as a peer:* and that *a committee of both houſes ought to meet to ſettle the preliminaries of the trials.* But the lords were not diſpoſed to liſten to the commons on any of theſe points. The reſult was a diſpoſal of the impeachment by the houſe of lords *ex parte* and without the houſe of commons: for that houſe would not proceed according to the requiſition of the houſe of lords, and the latter acquitted on ſuch impeachments, as were deemed ripe for trial, and diſmiſſed the others for want of proſecution (*a*). But nothing occurred on the great points of controverted judicature; except that this diſpute between the two houſes about the courſe on impeachments led to the conſideration *out of doors, whether the judicature of parliament was not in other reſpects appropriate to the peerage,* and ſo cauſed the publication of ſome writings (*b*), which accidentally include the *general* conſideration of that judicature.

(*a*) See the Proceedings and Reſolutions publiſhed by the Houſe of Peers in 1701, in Relation to the impeached Lords; and the State of the Proceedings of the Commons publiſhed by their order on the ſame ſubject. See alſo 2. Burn. Hiſt. of his Own Time, p. 265 to 280.

(*b*) On the part of the commons Sir Humphrey Mackworth publiſhed "A "Vindication of the Rights of the Commons of England."—This was anſwered for the lords by a piece, intitled, "A Vindication of the Rights of Prerogatives "of the Right Honorable the Houſe of Lords."—In both of theſe pieces the *general judicature in parliament* is diſcourſed of, as well as the *particular* judicature on *impeachment by the commons.*

THE next contentions of lords and commons, about the conteſted branches of parliamentary judicature, occurred the firſt parliament of queen Anne; which began to ſit in October 1702, and was remarkable for a ſucceſſion of very ſerious differences between the two houſes on other (*c*) points, as well as on points of a judicative kind.

ONE of theſe two quarrels of judicature aroſe from a petition (*d*) of Lord Wharton, ſtiled a petition of *appeal*, to the lords, againſt an order of the court of exchequer made *ex officio* for *preſervation of a record*. The record was a ſurvey of the honor of Richmond, ſaid to be above 100 miles in circumference. Lord Wharton had inſtituted a ſuit in chancery againſt Charles Bathurſt Eſquire Mr. Squire and others about ſome lead mines; and wiſhing to deprive them of the benefit of this record in evidence, he ſtated the record to have been *impoſed on the court of exchequer by contrivance* between Mr. Squire and Mr. Thompſon a ſworn officer of that court, and prayed to have the *order diſcharged* and taken off the file. This pro-

(*c*) See the caſe of Lloyd Biſhop of Worceſter about his *interference in a county election*, 3. Chandl. Deb. Comm. 206. & 2. Chandl. Deb. Lords 45.—the controverſy about the *bill againſt occaſional conformity*, 3. Chandl. Deb. Comm. 211. & 2. Chandl. Lords 48. 56.—the caſe of Lord Halifax on charge of *neglect of duty as auditor of the receipt of the exchequer*, including *a bill for commiſſioners of public accounts* with the caſe of Mr. Bertie, 3. Chandl. Deb. Comm. 247. to 275. & 2. Chandl. Deb. Lords 48.—and the complaint by the commons againſt the lords *for taking priſoners charged with treaſon out of cuſtody of the crown without leave, and examining them*, 3. Chandl. Deb. Comm. 286. to 302. & 2. Chandl. Deb. Lords 71.

(*d*) Journ. Dom. Proc. 9. Nov. 1702.

ceeding

ceeding was objected to by a counter petition of Mr. Squire and Mr. Thompſon to the lords, on the ground, that *no ſuit was depending in the exchequer*; and that therefore Lord Wharton's petition, though called an *appeal*, was an *original complaint* againſt them *for a crime*, for which they ought to be left to be tried according to the uſual courſe of the law of the land. But the lords, after hearing counſel (*e*), over-ruled the objection, and ordered them to anſwer Lord Wharton's petition. However eleven lords proteſted againſt thus taking cognizance; as well becauſe it was *beyond the houſe of peers to make an order againſt a record in which the King's ſubjects in general were intereſted*; as becauſe it was in effect not an *appeal*, but an *original* cauſe. After this, there were further proceedings of the houſe of lords in the caſe, and the city of London became involved in it. But at length Mr. Bathurſt (*f*) petitioned the houſe of commons for relief againſt the proceedings of the lords: and they (*g*) reſolved, that the proceeding of the lords, in taking cognizance of this matter, was without precedent and *unwarrantable*, and *tended to ſubjecting the rights and properties of all the commons of England to an illegal and arbitrary power*; and that it was *the undoubted right of all the ſubjects of England to make uſe of the record, as they might by law have done before the proceedings of the houſe of lords*. Theſe reſolutions were met

(*e*) Journ. Dom. Proc. 12. Feb. 1702-3.

(*f*) Journ. Comm. 20. Jan. 1703-4.

(*g*) Ibid. 28. Jan. 1703-4.

by

by the lords (*b*) with a counter reſolution declaring the votes of the commons, which contradicted the proceedings of the lords, *without precedent, unwarrantable, and an uſurpation of a judicature to which they had no pretence:* and the lords ordered this counter reſolution to be *printed and publiſhed.* Here the caſe cloſed as between the two houſes. Had not this beginning of the lords to revive the exerciſe of *original* juriſdiction under the *name* of an *appeal* been thus warmly reſiſted by the commons, the victory, which in point of effect they formerly gained in Skinner's caſe, might have been undone. But, as it was, that victory became confirmed. Probably this caſe of Lord Wharton is the laſt inſtance of an attempt by the lords, to make themſelves an *original* judicature: and even this caſe had the *ſhew* of being *appellant*. The claim of the peerage to *original* juriſdiction was overcome by the effect of Skinner's caſe. By expoſure of the feebleneſs of the attempt to revive it under a *diſguiſe*, the door became in a manner ſhut to an *indirect* introduction.

THE other quarrel of judicature, between the two houſes in the firſt parliament of queen Anne, was the very famous caſe of the Aileſbury *election*. The direct ſubject of the caſe was the juriſdiction over the right of voting for members of parliament: the lords adjudging, on a writ of error, that an elector, whoſe vote is wilfully refuſed by a returning officer, may maintain an action on the caſe for damages againſt him: and

(*b*) Journ. Dom. Proc. 27. March 1704. For a full account of the proceedings on this caſe of Lord Wharton's petition to the lords and Mr. Bathurſt's to the commons, ſee 3. Chandl. Deb. Commons 302. to 308. See alſo Journ. Comm. 20. Jan. 1703-4, where Mr. Bathurſt's petition is entered at length.

the

the commons moſt ſtrenuouſly inſiſting, that matters of election were the *peculiar* of their houſe and only examinable by themſelves, except in certain ſpecial caſes provided for by ſtatute; and that to allow ſuch an action was to expoſe their deciſions on the rights of voting, to the controul, primarily of the courts of Weſtminſter Hall, and ſecondarily of the houſe of lords. But incidentally this caſe ſo far produced a conſideration of the *appellant* juriſdiction exerciſed by the lords, as to give to the commons the opportunity of renewing their antient objections on that head. It was not till quite in the latter ſtage of the long and violent contention between the two houſes, that the point of appellant judicature occurred. It was juſt after two very memorable and intereſting reſolutions of the lords, one about the *right* to the writ of *habeas corpus*, and the other about the *right* to *writs of error*. By the firſt of thoſe reſolutions, the lords, as if they diſdained the pretenſion to have even their own commitments leſs open to examination by the judges than commitments by thoſe acting under royal authority, declared, "that every Engliſhman, "who is impriſoned *by any authority whatever*, has an un- "doubted right, by his agents or friends, to apply for and "*obtain* a writ of *habeas corpus*, in order to procure his liberty "by due courſe of law." By the ſecond reſolution, the lords,—probably aſſiſted by that great lawyer Lord Somers,—and according to their own account, recollective of the vote of the commons in 1689 in Sir Thomas Armſtrong's caſe, that a writ of error was a writ of right in *treaſon* and *felony* (*i*),—and zealouſly

(*i*) Before paſſing this ſecond reſolution the twelve judges were heard by the lords. That they were ſummoned to attend and to ſpeak to the point, "Whether "a writ

zealouſly ſtepping beyond both the opinion of the judges, and what the occaſion being only of *miſdemeanor* demanded from them,

" a writ of error be a writ of *right* or of grace," is entered in the Journal of the Lords for 16. Feb. 1704-5. But what ſeems remarkable, the journal of the next day, which was appointed for the attendance of the judges, and which was the day on which the lords came to the reſolution about writs of error, takes no notice either of any hearing or opinion of the judges. However it is certain, that they gave an opinion; for it is ſo ſtated by the lords themſelves in their juſtificatory addreſs to the queen of the 13. March 1704-5. The following extract from that highly-finiſhed performance will ſhew this, and at the ſame time ſerve as a ſpecimen of its great value.

" Whether the writs of error ought to be granted, and what ought to be done " upon the writs of error afterwards, are very different things. The only matter " under your Majeſty's conſideration is, whether *in right and juſtice* the petitioners " are not intitled to have the writs of error granted. We are ſure, the houſe of " commons in the year 1689 was of opinion, that a writ of error, even in caſes " of *felony* and *treaſon*, is the *right* of the ſubject, and ought to be granted at his " deſire, and is *not an act of grace and favor*, which may be denied or granted at " pleaſure. So that as far as the houſe of commons ought to have weight in " ſuch a queſtion, whatever the preſent opinion of that houſe is, they then thought " a writ of error was the *right* of the ſubject in *capital* caſes, *where only it had* " *been at any time doubted of.* But that it is a *writ of right in all other caſes*, has " been *affirmed in the law-books*, is *verified by the conſtant practice*, and is *the* " *opinion of all our preſent judges, except Mr. Baron Price and Mr. Baron Smith.* " The law, for the better protection of property and liberty, has formed a ſubor- " dination of courts, *that men may not be finally concluded in the firſt inſtance. But* " *this is a very vain inſtitution, if they be left precarious in the method of coming* " *to the ſuperior court.* All ſuits are begun as well as carried on by the authority " of your Majeſty's writs, and *the ſubject has a like legal claim to all of them.* " The petition for a writ of error returnable in parliament is *only matter of form* " *and reſpect* to your Majeſty (like the petitions, which the ſpeaker makes in the " name of the commons at the beginning of every parliament for thoſe privileges, " which they do not believe to depend upon the anſwer to thoſe petitions), and " *is no more to be refuſed than any other writ* throughout the cauſe. *To*

" *affirm*

them,—declared a writ of error to be, *univerſally*, and *without any exception*, a writ of *right*; the words of their reſolution being, "that a writ of error is *not a writ of* GRACE, "but *of* RIGHT, and OUGHT NOT TO BE DENIED TO THE "SUBJECT, when duly applied for, *though at the requeſt of* "*either houſe of parliament*, the denial thereof being an ob- "ſtruction of juſtice contrary to *magna carta*." Theſe two reſolutions were cauſed by an addreſs of the commons to the

"*affirm the contrary is to allow an arbitrary latitude to intercept juſtice, and to* "*make it depend upon private advices and extrajudicial determinations, whether* "*any cauſes at all ſhall be brought to judgment before the high court of parlia-* "*ment.*"

This eloquent pleading for the *principle* as well as the *practice* of the right to a writ of error, makes it evident, that the judges did give their opinion, and ſeems in ſubſtance to agree with the report in Salkeld 504. for there it is ſtated, that the point was, whether a writ of error was EX DEBITO JUSTITIÆ or EX MERA GRATIA; and that ten of the judges held it grantable EX DEBITO JUSTITIÆ *except in treaſon or felony*; but that Price and Smith held it *not of right or demandable by the ſubject in any caſe.* Why in the journal of the lords it was omitted to enter the opinion given by the judges, is not perhaps eaſy to be accounted for. Nor is it perhaps quite clear, what ought to be inferred from the *exceptions of treaſon and felony* in the opinion of the ten judges. It is taken for granted by Lord Mansfield in Mr. Alderman Wilkes's caſe of error in 4. Burr. 2550. that the judges meant to declare writs of error *merely of grace in treaſon or felony*; and ſo great an authority muſt of courſe have vaſt influence in conſtruing the exceptions. It muſt be confeſſed alſo, that it is natural ſo to interpret them. But on the other hand it is poſſible, that the ten judges might mean to leave the caſes of treaſon and felony undetermined, in reſpect, that at the utmoſt the caſe under conſideration was only *miſdemeanor*, and that conſequently to decide for treaſon and felony was *extra-judicial.* If there are any exiſting manuſcript notes of the reaſons given by the ten judges for their opinion, this point probably may be fully aſcertained.

queen, not to grant writs of error to certain perſons, who had been committed by the commons, for being concerned in actions againſt the bailiffs of Aileſbury for refuſing votes at an election. They were paſſed in February 1703-4 (*k*): and are here mentioned with more particularity; becauſe though ſo very important, theſe reſolutions of the lords, and the previous reſolution of the commons in 1688, have not always been recollected, even by the moſt enlightened of our judges (*l*), and have neither been tranſcribed into our law reports, nor adverted to by the beſt of our law writers. But beſides theſe two reſolutions as to writs of *habeas corpus* and of error and ſome others connected with them, the lords, on the occaſion of this important buſineſs of the Aileſbury election, though in a much earlier ſtage of it, had reverſed the judgment of the king's bench in the firſt of the actions brought againſt the bailiffs of Aileſbury to recover damages for refuſal of votes; namely, in the action brought by Aſhby againſt White and others; and thereby the lords had affirmed the right to bring and maintain ſuch actions. It was indeed by this reverſal, which was after hearing ten of the judges and finding them

(*k*) Journ. Dom. Proc. 17. Feb. 1704-5.

(*l*) See Lord Mansfield in Mr. Alderman Wilkes's caſe, 4. Burr. 2550.—With reſpect to the editor, he had particular occaſion in Dec. 1784 to conſider the ſubject of writs of error in criminal caſes, whilſt Mr. Chriſtopher Atkinſon was applying for the then Attorney General's *fiat* for a writ of error to reverſe the judgment of the king's bench againſt him for perjury. Upon that occaſion, though unconnected with Mr. Atkinſon, and though not profeſſionally concerned in the buſineſs, the preſacer, to oblige a law friend, framed a paper intitled "Authorities with ſome few Remarks concerning Writs of Error in Criminal "Caſes."

almoſt

almoſt equally divided, that the commons were warmed, into voting ſuch actions a breach of their privileges in reſpect of their appropriate judicature for trial of the election of their own members, and into the commitments from which the writs of *habeas corpus* had originated. When, therefore, conferences at length took place between the two houſes, the commons were touched to the quick, by a judgment, which to them at leaſt appeared, *in a manner* to ſubjugate their *judicature for trial of elections of their own members*, to the *appellant* judicature of the lords under writs of error; and could not forget the recent conteſts between the lords and them about judicature both *original* and *appellant*. Nor was it a ſmall aggravation to the wound, which was or at leaſt was conceived to be inflicted on the *election* judicature of the commons, to perceive, that though ſuch juriſdiction was not denied by the lords, yet inſinuation of its having been antiently otherwiſe had eſcaped; and what was of itſelf enough to inflame the commons, that the ſecret, though not avowed, origin of this was in that democratical ariſtocrat and ariſtocratical monarchiſt, that almoſt univerſal foe of the commons, that foe to their antiquity as well as their rights and privileges, the very Mr. Prynne, from whoſe labours moſt of the effuſions of Dr. Brady and his diſciples on the ſame points, though often without acknowledgement, have emanated, and upon whom ſo much remark has been already expended. Thus irritated, the commons were naturally enough watchful for the proper opportunity of emitting their revenge. Accordingly in the ſecond of the conferences with the lords, when it ſeemed to be the exact moment for vindictive explanation from the commons, they did not fail to ſeize the occaſion. To make alſo their reſent-

ment more conſpicuous, they finiſhed their remonſtrances to the lords at the conference, by anſwering their vote for the *univerſal right* of the ſubject to a writ of error; not only by inſiſting on its inapplicability to the ſummary proceeding upon the writ of *habeas corpus*; but by adding a philippic againſt the whole fabric of ariſtocratical judicature, more eſpecially the *appellant* branch, not even the commiſſionary branch under writs of error being ſpared (*m*). But on this part of the controverſy,

(*m*) The juſtificatory papers for the lords as delivered at their conferences with the commons have been already mentioned with the high praiſe moſt juſtly due to them. It is but juſtice to add, that the two juſtificatory papers for the commons are ſo ably finiſhed, that it is difficult to ſay, on which ſide ſuperiority preponderates. The two papers for the commons are entered in their Journal for 6. & 13. March 1704-5. The firſt of theſe two latter papers it is, which contains the philippic above alluded to. It conſtitutes the peroration of the argument, and is in the words following:

"The commons ſhall not enter into any conſideration, whether a *writ* of *error* is "a *writ* of *right* or of *grace*; they conceiving it not material in this caſe, in which "no writ of error lies. Nor was ever any writ of error brought or attempted in "the like caſe before; and the allowing it in ſuch caſes would not only ſubject "all the privileges of the houſe of commons, but the liberties of all the people of "England to the will and pleaſure of the houſe of lords.

"And when your lordſhips exerciſe of judicature upon *writs of error* is con- "ſidered, how unaccountable in its foundation, how inconſiſtent it is with our "conſtitution, which in all other reſpects is the wiſeſt and happieſt in the world, "to ſuppoſe the *laſt reſort in judicature and the legiſlature to be differently* "*placed*; and when it is conſidered, how that uſurpation *in hearing of appeals from* "*courts of equity*, ſo eaſily traced, and though often denied and proteſted againſt "yet ſtill exerciſed and almoſt every ſeſſion of Parliament extended: it is not to "be wondered, that after the ſucceſs your lordſhips have had in thoſe great ad-

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controverſy, which was made the very concluſion of the argument on the ſide of the commons, the lords in their reply followed the proud maxim of their predeceſſors, declining all diſcuſſion of their own judicature; as if it was a ſanctuary not to be entered except by themſelves; and as if it was a characteriſtic of peerage to *adjudge* on the privilege of the commons, without ſuffering their own to be ſo much as *argued*.

" vances upon our conſtitution, you ſhould now at once make an attempt upon " the whole frame of it, by drawing the choice of the commons repreſentatives to " your determination; for that is a neceſſary conſequence from your lordſhips en- " couraging the late actions, and your countenancing a writ of error, which, if " allowed upon ſuch a proceeding, might as well be introduced upon all acts " and proceedings of courts or magiſtrates of juſtice. And though the preſent " inſtance has been brought on under the ſpecious pretence of preſerving liberty, " it is obvious the ſame will as well hold to controul the bailing and diſcharging " priſoners in all caſes.

" And the commons cannot but ſee, how your lordſhips are contriving by all " methods, to bring the determination of liberty and property into the *bottomleſs* " *and inſatiable gulph of your lordſhips judicature*; which would ſwallow up both " the *prerogatives of the crown and the rights and liberties of the people*; and which " your lordſhips muſt give the commons leave to ſay they have the greater reaſon " to dread, when they conſider, in what manner it has been exerciſed, *the in-* " *ſtances whereof they forbear, becauſe they hope your lordſhips will reform, and* " *they deſire rather to compoſe the old, than to create any new differences.*

" Upon the whole the commons hope, that upon due conſideration of what they " have laid before your lordſhips, you will be fully ſatisfied, that they have acted " nothing in all theſe proceedings, but what they are ſufficiently juſtified in from " precedents and the known laws and cuſtoms of parliament; and that your lord- " ſhips have aſſumed and exerciſed judicature, contrary to the known laws and " cuſtoms of parliament, and tending to the overthrow of the rights and liberties " of the people of England."

THUS

THUS the lords, by helping to aſſail a judicature *undeniably* the peculiar of the commons, relighted the flame againſt their own favorite but more queſtionable claims of judicature.

HOWEVER the flame was like the flaſh of an exhauſted taper; bright but vaniſhing.—A prorogation of parliament almoſt immediately ſucceeded the ſtorm of the laſt of the conferences between the two houſes.—The prorogation was ſoon followed with a diſſolution.—From that diſſolution to the preſent hour, being now a period of *almoſt a century*, there has been nearly an uninterrupted calm in the hemiſphere of parliamentary judicature.

THERE was indeed the ſemblance of a new ſtorm between the two houſes in the year 1717, on the impeachment of the famous Harley Earl of Oxford for *high treaſon and high crimes and miſdemeanors*; for the lords inſiſted *not to proceed with the inferior crimes alledged till judgment had paſſed on the charge of high treaſon, and refuſed a free conference* to the commons on the ſubject; and the commons would not ſubmit to be ſo preſcribed to; and the reſult was a trial without appearance of the commons to ſupport their charges, and ſo acquittal became of courſe. But it is apprehended, that from the year 1717 there has been an abſolute ceſſation of hoſtility between the lords and commons on the right of judicature in parliament. Inſtructed by the heated conteſt about the *election* judicature of the commons, and by the prior conteſts about the *original* and *appellant* juriſdiction exerciſed by the lords, both houſes ſeem to have been equally ſtudious in avoiding judicative contentions.

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THE lords, though perhaps for the moment ſomewhat elevated by the *popularity*, which from various circumſtances was attached to their ſide of the queſtion in the Aileſbury caſe, ceaſed to encourage interference with the judicature of the commons over the rights of election :—ceaſed to meddle with *original* juriſdiction :—ceaſed to countenance attempts to introduce *original* cauſes under the diſguiſe of being *appellant* :—ceaſed to extend their exerciſe of *appellant* juriſdiction beyond examining judgments at law under writs of error and decrees of our courts of equity upon petitions of appeal :—ceaſed to meddle with appeals from ſentences of *eccleſiaſtical* courts and other courts of *ſpecial* juriſdiction :—ceaſed to advance claims of *univerſal* juriſdiction both *original* and *appellant* :— ceaſed to ſtate themſelves as being incluſively the *virtual abſorbing* and *inherent* repreſentatives of the king and commons in matters of judicature, and in effect for that purpoſe the *full* and *whole* parliament, and as ſuch the *ſupreme* and *laſt reſort*.

ON the other hand the commons were not wholly unforbearing.—They ceaſed to interrupt the exerciſe of appellant juriſdiction by the lords over decrees of our courts of equity.—They ceaſed to reproach the lords for ſuch exerciſe of judicature as an aſſumption by the lords "contrary to the known "laws of parliament, and tending to overthrow the rights "and liberties of England."—Nay, they have even forborn to revive conſidering the right of the lords, to *fine* the commons of England for breach of privilege, and to *impriſon them on that account beyond the ſitting of parliament*; notwithſtanding the objections heretofore ſo ſtrongly urged againſt both of thoſe

thoſe practices; and notwithſtanding the laudable abſtinence of the commons themſelves, from attempting to vindicate the breach of their own privileges, otherwiſe than by an impriſonment, which, if not ſooner determined by their own act, of courſe ceaſes when parliament is either diſſolved or prorogued.

THUS at length the lords have ſo long acquieſced in the condemnation of their exerciſe of *original* juriſdiction, that it ſeems as if they had never claimed it: and the commons have ſo long acquieſced in the exerciſe of *appellant* juriſdiction by the lords, that it now ſeems as if it had never been diſputed.

EVEN with others, the controverſy about the juriſdiction of the lords ſeems to have ſlept almoſt as long as with the houſes of parliament.—The lateſt manuſcript treatiſe, the prefacer has been able to diſcover, is a ſhort piece againſt the appellant juriſdiction as exerciſed by the lords, which was apparently written about or juſt after the cloſe of the Aileſbury caſe (*n*).—The lateſt printed book of controverſy he has ſeen on the ſubject is a ſhort treatiſe publiſhed in 1718 by an Iriſh

(*n*) This piece now belongs to the prefacer. It is intitled "Remarks on the "Judicature of the Lords upon Writs of Error and Appeals in Parliament." It ſeems to have been chiefly written with a view to revive the antient judicature of the king's *ordinarium concilium* in parliament; for it cloſes with a propoſal, that the lords ſhould invite queen Anne to the exerciſe of a ſhare of the judicial power of parliament; and that for that purpoſe petitions ſhould be addreſſed "to the "queen and lords, or to the queen and her council or great council, *according to* "*the antient form*, and *not to the lords only*."

gentleman,

gentleman; who firſt appealed from an order of the Iriſh chancery to our houſe of lords; but when the order was affirmed with coſts, refuſed to pay them; and being committed by the lords (*o*) for the contempt, at length wrote to diſprove the very juriſdiction himſelf had choſen and to proclaim his own error. The title and dedication of the book are very ſignificant of its contents. "The Rights of the Commons in Parliament aſſembled and the Liberties of the People aſſerted by "John Carey Eſquire." The dedication is "To the Commons of Great Britain in Parliament aſſembled." The writer appears tolerably well informed. But the argument againſt the *appellant* juriſdiction of the lords is neither profound nor eloquent. Coming alſo from one, who apparently wrote under the influence of pique and anger, and was quarrelling with the legality of the judicature choſen by himſelf, it was not likely to cauſe much impreſſion upon the public mind. It appears by the book, that the author attempted to obtain his liberty by *habeas corpus*. The latter part of the book conſiſts of his own arguments before a judge at his chambers for being bailed; and contains ſome remarks as to commitments for contempts, which deſerve the attention of lawyers. Had this *habeas corpus* caſe, on a commitment by the lords in exerciſe of their *appellant* juriſdiction over decrees in equity, occurred during the heat of the conteſts between the two houſes in the Aileſbury buſineſs, it might have brought the beſt eloquence and the profoundeſt learning of Weſtminſter Hall into the fulleſt action againſt that appellant judicature,

(*o*) Journ. Dom. Proc. 21. March 1717-18.

and ſo have put it to the ſevereſt of teſts. But the caſe came too late. The ſtorm of judicature was paſt. The zeal againſt the appellant judicature of the lords ſeems to have been previouſly extinguiſhed by a ſort of conviction,—that, however irregular and unconſtitutional that judicature might be in its origin, it had obtained vaſt ſanction from long practice:—and that whilſt rightly and conſcientiouſly adminiſtered, and not uſed as a precedent for a more extended *appellant* judicature than that under writs of error and over decrees of equity, nor founded upon to attract *original* juriſdiction, or to abſorb the *ſupreme judicature* and *real laſt reſort of the full and whole parliament* conſiſting of king lords and commons, it was too beneficial in its effects to be lightly revoked or even to be newly modified.

AT length we reach the proper place, for introducing the learned reader, to the writings of lord Hale on this extenſive arduous and complicated ſubject of judicature in parliament, and more eſpecially to the Treatiſe now printed.

AT one time the prefacer had it in view to have been full in his explanations on this head. But he feels ſo exhauſted by the narrative, which he has attempted to give of the chief controverſies about the right of judicature in parliament from the acceſſion of James the Firſt, and the time for publiſhing this preface is become ſo preſſing, that, inſtead of a ſubſidiary illuſtration of the plan connections and great features of lord Hale's

Hale's profound emanations, and inſtead of attempting the focus of his reaſonings, the preſacer is forced to be content,—with dry and imperfect hints of the nature and occaſion of lord Hale's various writings;—and with a ſhort haſty and half finiſhed compariſon, between his opinions on ſome leading points, and the reſult of the contentions of lords and commons, in which he ſo zealouſly interpoſed the invaluable fruits of his rare learning againſt the high pretenſions of the ariſtocracy.

LORD HALE appears to have early applied a ſevere attention to the ſtudy of judicature in parliament.

IN a manuſcript volume, which in Biſhop Burnet's liſt of lord Hale's writings is titled INCEPTA DE JURIBUS CORONÆ, but is by himſelf ſtiled DE JURE REGIO, he touches upon judicature in parliament in many points of view. But the book is in general a mere outline; and not only as ſuch is in many reſpects very unfiniſhed, but has leaves torn, and is otherwiſe very much defaced. Yet even this rough collection contains very rare and valuable materials, and ſometimes paſſages happily and ſtrongly expreſſed. Nay, though a very fragment, it ſometimes furniſhes important matter on very high points of our law and conſtitution, not always to be met with in his more finiſhed writings relative to the ſame ſubjects. On the particular ſubject of judicature, lord Hale, even at the time of writing theſe his firſt collections concerning the king and his prerogatives, ſeems to have been impreſſed, that the judicative power of parliament was exerciſeable by king lords and commons in the ſame manner as the legiſlative power; and that the judicative power of the

houſe of lords conſidered ſeparately was merely in conjunction with the king's *ordinarium conſilium*, the author repre'enting the peers and that council to be a concretion into one grand council of the king. Therefore he conſiders the great officers of ſtate, the judges, and other members of the *conſilium ordinarium*, as co-ordinate and conſtitutionally intitled to a *voice* equally with the lords, ſo far as the latter have a judicative power ſhort of and diſtinct from that of the whole parliament. On the other hand, where the judicative power of the whole parliament or its *legiſlative* power is to be exerciſed, he conſiders the great officers of ſtate judges and others of the *conſilium ordinarium* as mere *aſſiſtants*. When theſe collections were made, is open to conjecture. But at preſent the preſacer is impreſſed, that at leaſt the part concerning parliament was written, ſoon after the ſtatute of 16. Cha. I. which made the long parliament indiſſoluble without the conſent of the lords and commons, or before the death of Charles the Firſt; for he obſerves, that though it was a duty in the king to obſerve the ſtatutes requiring frequent parliaments, yet there could not have been a concourſe of parliament without his writ *till the* LATE *act*.

LORD HALE's next work, having any connection with the judicature of the lords or parliament, is a very valuable though unfiniſhed manuſcript, which he intitles PREPARATORY NOTES TOUCHING THE RIGHTS OF THE CROWN. This alſo is entirely in his own hand-writing. It is much leſs of an outline than the INCEPTA; and ſo far as it goes, ſeems like a firſt attempt at the reduction of the ſketches in the INCEPTA into the form of a treatiſe. It is divided into chapters, of which

ſome

ſome are in a manner compleated, and others are full of blanks ſeemingly left to be filled up as the author ſhould find it convenient to ſupply matter. From ſome paſſages in this ſecond work, it may be conjectured to have been compoſed about the ſame time as the INCEPTA, that is, after 1640 and before 1649. So far as theſe PREPARATORY NOTES touch upon the houſe of lords ſeparately, the judicative power of the lords is deſcribed much in the ſame manner as in the former collections; equally conjoining them and the king's *conſilium ordinarium* into one great judicative council, and equally deſcribing the judges and other members of the *conſilium ordinarium* as cojudges. But when he comes to treat of the houſe of commons, he writes doubtfully as to the neceſſity of their concurrence in judicature. On the one hand he cites the antient form of the writ of error from Raſtall's Entries, 302. where the commons are mentioned equally with the lords, and the records of the reverſal of the judgments againſt Mortimer and Lancaſter in 1. E. 3. and of the judgment againſt Maltraver as precedents of the concurrence of the commons. On the other hand he cites the memorable roll of parliament of 1. Hen. 4. to which we have already ſo much adverted as a "ſhrewd record to the contrary." But he profeſſes to avoid determining the point, and to ſpare the diſpute of it; noticing however, that according to that record the king has at leaſt a negative voice in matters judicative.

A THIRD manuſcript of lord Hale, containing matter relative to the judicature of parliament is intitled PREROGATIVA REGIS. It is in his own hand-writing, except a ſmall part. It ſeems to have been written after the PREPARATORY NOTES,

NOTES, and to have been intended as a new and more extended treatiſe on the ſame ſubject. Sometimes, however, it is a mere tranſcript of the PREPARATORY NOTES; and this happens to be the caſe, as to the part relative to the lords and commons and the judicative powers exerciſed in parliament.

SUCH were the writings of lord Hale relative to parliamentary judicature before the Reſtoration.—It ſhould ſeem from them, that he had not fully inveſtigated the ſubject: and therefore, that though he appears to have advanced far enough to ſatisfy himſelf, that *ſome* judicative powers of the lords were exerciſeable by them and the king's *conſilium ordinarium* conjunctly; yet he had not made up his mind on the point, whether to the exerciſe of the *real* judicature of parliament the concurrence of the commons was eſſential.

BUT after the Reſtoration the judicative powers, exerciſed by the lords both *originally* and *appellantly*, became, as we have before explained at length, ſubjects of the moſt ſerious controverſy between the two houſes of parliament.

THE controverſy, without doubt, attracted the attention of lord Hale. Already converſant with the whole range of parliamentary ſtructure, and in the habit of familiarity with the records upon which the conſideration of the conteſted points depended, he was peculiarly qualified to explore and unveil the ſubjects in diſpute, as far as the darkneſs and imperfection of the antient rolls of parliament and other antient records would allow. Being thus previouſly prepared, and holding a high judicial ſituation from the time the controverſy commenced

commenced till the commons had promulged votes condemning, firſt the exerciſe of *original* juriſdiction by the lords and then their exerciſe of the *appellant* juriſdiction over decrees of *equity*; lord Hale found himſelf ſtrongly called upon to apply his labours toward clearing up the points in diſpute. Accordingly he inveſtigated them with ſuch fullneſs profoundneſs and particularity, and with ſuch ſtrength of diſcrimination, as would have been almoſt incredible even from his vaſt mental endowments and unremitting induſtry, though he had not been ſo arduouſly occupied in diſcharging the function of chief baron for one part of the time and of chief juſtice of the king's bench for the remainder.

THE reſult of his labors conſiſted of three diſtinct treatiſes.

WHAT is conjectured to be the firſt of them is intitled "A DISCOURSE OR HISTORY CONCERNING THE POWER "OF JUDICATURE IN THE KING'S COUNCIL AND IN "PARLIAMENT." It is wholly in lord Hale's handwriting. It contains eleven chapters (*p*). The firſt five are

(*p*) The chapters are as follow: — "I. Touching the Various Councils of "the King of England. — II. Concerning the Lords Houſe and the Antient "Form of Proceeding therein, in Relation to Matters of Judicial Proceedings or "Points of Juriſdiction. — III. The general Conſideration of the Judiciary "Power of the Lords Houſe in Parliament; and firſt concerning Tranſmiſſion of "Cauſes to ſeveral Courts or Juriſdictions. — IV. Concerning the Power of the "Lords Houſe in Caſes of Adjournments in Caſes of Difficulty out of other "Courts, and Removing of Records for the Expedition of Juſtice. — V. Con"cerning *Writs of* ERROR *in Parliament* and the Right of Proceeding therein. — "VI. Concerning the Judicial Proceedings in the Houſe of Lords in *Civil* Cauſes "upon

are introductory to the main point. The ſixth of them begins with explaining the chief object of the treatiſe to be the juridical powers of the lords in cauſes *civil* upon *original* petition in their houſe. It appears to have been written in or juſt after the year 1669, whilſt lord Hale was chief baron of the exchequer: for in the ſixth page of the manuſcript, he refers to Prynne's Animadverſions upon lord Coke's fourth Inſtitute, which are in the title page dated in 1669, and probably were publiſhed early in that year, as a *late* publication; and in page 46 of the manuſcript lord Hale adverts to Lord Holles's piece called "The Grand Queſtion," which was alſo publiſhed in that year. There cannot be a doubt, but that this treatiſe of lord Hale was written, on the occaſion of the great conteſt between the two houſes about the exerciſe of *original* juriſdiction by the lords in the caſe of Skinner againſt the Eaſt India Company. Some of its contents are nearly the ſame, as the matter in the treatiſe now preſented to the publick. But this manuſcript diſcourſe, as might be expected from its profeſſed object, is more copious on the point of *original* juriſdiction, than the treatiſe now printed, which has the point of *appellant* juriſdiction more in

"upon ORIGINAL Petitions between Party and Party.——VII. Concerning the "ſeveral Precedents and Inſtances of Relief in *Civil* Cauſes in the FIRST IN-"STANCE; and What Influence Acts of Parliament of ſucceeding Times have "had touching the ſame.——VIII. Concerning the Proceedings in *Civil* Cauſes "between Party and Party in the Time of Edward the Second and in enſuing "Times.——IX. Concerning the Juriſdiction of the Lords in Relation to Suits "between the KING and SUBJECT.——X. Concerning the Juriſdiction of the "Lords in Caſes *Criminal*.——XI. The Various Particulars touching the Lords "Juriſdiction in *Criminals*."

view.

view. The aim of this Diſcourſe on the judicature of the king's council in parliament is to diſprove the pretenſions of the houſe of lords to *original* juriſdiction. After eleven chapters, of which the Diſcourſe conſiſts, there are ſome collections of lord Hale on the forms of receiving petitions in parliament and their determination. But this part is not chaptered: and though connected in point of ſubject, appears to have been made in ſome reſpect a diſtinct conſideration.

WHAT ſeems to be the ſecond treatiſe is a thin volume titled on the back by lord Hale himſelf "PREPARATORY "NOTES TOUCHING PARLIAMENTARY PROCEEDINGS." But this indorſement on the volume is far more extenſive than the treatiſe it contains: for the latter is confined to the *judiciary* powers exerciſed by the lords or to ſubjects connected with them. It is entirely in lord Hale's hand-writing. It conſiſts of twenty-ſeven chapters. In the fifteenth chapter, which is concerning writs and petitions of error in parliament, lord Hale begins with obſerving, that the *great* ſcope he aimed at in the diſcourſe was, to give "a true narrative "of the juriſdiction of the houſe of lords in point of RE-"VERSAL OF JUDGMENTS AND SENTENCES OR DECREES." This therefore ſeems a proper title for it. From the contents it appears to have been his firſt eſſay on or rather *againſt* the *appellant* juriſdiction exerciſed by the houſe of lords over decrees in equity. As his "DISCOURSE OR HIS-"TORY CONCERNING THE POWER OF JUDICATURE IN THE KING'S COUNCIL AND IN PARLIAMENT" chiefly applies to the conteſt between the two houſes in the caſe of *Skinner againſt the Eaſt India Company* about *original* juriſdiction; ſo this treatiſe applies to the conteſt between

them in the caſe of *Shirley againſt Fagg* about juriſdiction *appellant*.

THE third treatiſe is that now offered to the publick. It is in lord Hale's own hand-writing, except chapter 30. which after the two firſt paragraphs is in the hand-writing of ſome perſon employed by the chief juſtice for tranſcribing. It is a more enlarged treatiſe, on the ſame ſubject and with the ſame views as the fecond treatiſe; like that extending both to *original* juriſdiction and juriſdiction *appellant*, yet chiefly applicable to the latter. Moſt probably it is lord Hale's lateſt performance on the juriſdiction exerciſed by the lords in parliament: for in chapter 28. he cites a king's bench caſe of Trinity 26 Cha. 2. and he died on Chriſtmas day 1676. Indeed the hand-writing of lord Hale at the latter end is ſome evidence of its being one of his lateſt works. In general his hand-writing is rather difficult to read. But throughout the treatiſe now publiſhed, his hand-writing is much more obſcure than in any other of his manuſcripts the editor has hitherto ſeen; and in the three or four laſt pages the writing is barely legible. The title as printed is from lord Hale's own hand-writing at the beginning of the manuſcript. Under the title there is written by lord Hale, "This book is *perfected*, but *I have not yet re-* "*viſed* it after it was written. M. H." This is noticed, that the reader may judge for himſelf, how far the treatiſe ought to weigh in point of authority; or rather how far this circumſtance deducts from that vaſt influence, which muſt neceſſarily belong to a great work by a great maſter.

SUCH

SUCH are the various writings, by lord Hale, relative to judicature in parliament and to the judicial powers claimed and exerciſed by the houſe of lords.

To the account thus given of thoſe writings, it would be the pride of the editor to add here an outline of the rareneſs of their very eſtimable contents, if it was in his power. But notwithſtanding his long acquaintance with them, he is forced by exhauſtment both of time and ſpirits to decline the attempt. Indeed though he ſhould have the fulleſt command of himſelf, and ſhould come freſh to the undertaking, with perfect deliverance from the ſhackles by which he is pinioned, the taſk would be vaſtly above his reach. To extract the proper inferences from the abundance of curious and profound matter in the following treatiſe alone, and to make the proper application, would be to trace Engliſh judicature to its primary ſources, and thence to purſue it in all its windings to its ultimate depoſit;—would be to illumine our juridical world in ſome of its darkeſt and remoteſt receſſes;—and conſequently would be to develop and illuſtrate ſome of the chief foundations of the Engliſh conſtitution and government. Such an enterprize belongs to minds of a high caſt; and on that account the preſacer feels, that under any circumſtances it would be raſh in him to have engaged in it. As he is really ſituate at this time, the undertaking is impoſſible.

BUT though the editor is neither equal nor at preſent at liberty to analize the rare materials, by the induſtrious collection and ſkilful uſe of which lord Hale undertakes to prove

the exceſs of ariſtocratical pretenſions in point of judicature; yet ſomething general may be here expected, towards comparing the reſult of his inveſtigations upon the great points, the ſtirring of which cauſed his interference, with the reſult of the long and heated controverſy upon them. For this limited purpoſe, the preſacer will accordingly make a ſhort effort upon thoſe leading claims by the learned Prynne and his noble ſucceſſor in the argument Lord Holles, which lord Hale was induced to diſapprove and controvert, or rather for the moſt part peremptorily to deny.

ONE of the proud claims on behalf of the houſe of lords was, that it was competent to them, whenever they thought fit, to exerciſe an *original* juriſdiction in *civil* caſes.—But lord Hale denied the right of the lords to ſuch a juriſdiction. He was followed in that opinion in his lifetime by the vote of the houſe of commons in the great caſe of Skinner againſt the Eaſt India Company; and after his death he was again followed by the commons in the caſe of Mr. Bathurſt in a manner which ſhewed that the commons would no more ſuffer ſuch a juriſdiction indirectly, than they would ſubmit to it directly.—The reſult is, that the lords have wholly ceaſed to enforce this claim for almoſt a century.

ANOTHER claim for the lords was to an *original* juriſdiction over *crimes* without impeachment by the commons.—But this alſo was poſitively denied by lord Hale: and not only did the proceedings of the commons in the caſes of Skinner and of Mr. Bathurſt include a decided condemnation of this claim; but the judges themſelves came forward ſolemnly and ſucceſsfully in

in the caſe of Bridgman againſt Holt, to proteſt againſt it.—Here again alſo the reſult has been with lord Hale; for nearly a century has now paſſed without an attempt at the exerciſe.

It was a further claim for the lords, that they have an *appellant* juriſdiction over cauſes in *equity* on *petition to themſelves*.—Lord Hale firmly and unequivocally controverted this claim. He alſo lived juſt long enough to ſee his opinion adopted by a vote of the houſe of commons. Afterwards indeed the blow was not followed up: and in this inſtance the lords finally prevailed; and now their exerciſe of this branch of juriſdiction ſtands, not only upon the foundation of a quiet poſſeſſion ever ſince the cloſe of the Aileſbury caſe in 1704-5, but upon the ſtill firmer foundation of ſuch an acquieſcence by both the crown and commons as would, if deeply looked into, moſt probably be found to amount to legiſlative recognition.—In this great point therefore, it muſt be confeſſed, that lord Hale's opinion has miſcarried, and that the houſe of lords have prevailed over his opinion. But the victory was not till after his death; and it was gained under ſuch circumſtances, as ſhew, that it was rather from the forbearance of the houſe of commons and from their jealouſy of the crown, than from any error in the ſtrict conſtitutional principles upon which lord Hale proceeded.

Another claim for the lords was, that they were intitled to an appellate juriſdiction over *all courts* and *all cauſes*.—Lord Hale oppoſed himſelf to the grandeur of this claim.—The reſult is with him and againſt the lords: for they meddle not either with

with appeals *eccleſiaſtical*, with appeals *maritime*, or with appeals in *prize* cauſes. *Colonial* appeals both at *law* and in *equity* have alſo been ſuffered to fall into other hands; namely, the hands of the *privy council*. Nay, what exceedingly in point of precedent tends to ſortify the principle of lord Hale's opinion againſt the claim of the houſe of lords is, that it would not be an eaſy taſk to bottom ſuch exerciſe of appellant juriſdiction by the privy council, otherwiſe than upon that principle of commiſſionary delegation of the crown, which lord Hale ſtates to be the very eſſence of the appellant judicature of the lords over the common-law courts under writs of error.

It was alſo ſtated as a claim of the lords, that their judicative power is *primitive* and *inherent*, as being by our conſtitution annexed to the peerage.—Lord Hale abſolutely refuſed to aſſent to this grand pretenſion.—Here again he has prevailed: for the conduct of the lords themſelves is enough to ſhew, that his opinion is at leaſt operative and effective; they neither declining to act as commiſſionated by writs of error under the great ſeal, nor oppoſing the privy council exerciſing commiſſionary appellant judicature under a leſs ſolemn delegation of royal authority.

It was a further claim for the lords, that they are the *ſupreme* juriſdiction, the *laſt reſort*; and that they have this immeaſurable power as conſtitutionally authorized to exerciſe the *judicature of parliament ſingly* and *ſolely*.—Againſt this pretenſion lord Hale, notwithſtanding all the calm of his diſciplined mind, was even indignant, as manifeſtly appears in the laſt chapter in the following treatiſe. That energetic chapter

chapter was probably compoſed only a few months before the deceaſe of lord Hale. It may thereſore be conſidered as the zealous ſuffrage of his dying breath againſt this ſovereign claim. He even treats it, as tending, to ſwallow up both king and commons in the abyſs of ariſtocracy, and to effectuate the moſt eſſential change in the Engliſh conſtitution.—But here lord Hale, or rather the conſtitution itſelf, is in effect once more victorious. For the time previous to lord Hale's deceaſe, the following treatiſe alone, excluſive of his other writings ſtill only in manuſcript, will ſufficiently bear teſtimony. For the time ſubſequent, without reckoning the continual and permanent *habit of the commons in having a ſtanding committee for courts of juſtice*, there is ſuch a ſeries of exerciſe of the judicature of parliament by ſtatute, both appellately in reverſing erroneous judgments and originally in attainting, as renders the lords themſelves witneſſes againſt their own pretenſion.

Upon this compariſon of lord Hale's opinions with the judicative claims for the houſe of lords, it is ſcarce too much to ſay, that the victory is wholly on his ſide, and wholly on the ſide of the real conſtitution, except in the ſingle inſtance of the appellant juriſdiction over decrees in equity; and that in the only inſtance, in which his opinion can be ſaid to have been ſubdued, it has been ſo rather from jealouſy of the crown, in favor of whoſe right the opinion operated, than from any error in the opinion itſelf. In other words, the ſober temperate and ſtrictly conſtitutional doctrines of the venerable and conſiſtent lord Hale, have gained a compleat victory over the raſh bigotted extravagant and encroaching eccentricities.

eccentricities of the haſty and inconſiſtent Mr. Prynne, and over his magnificent claims for the lords, in all the grand points of *originality appellancy univerſality ſupremacy* and *ſoleneſs*, with ſcarce one exception; that is, in all of them, except part of one, wholly and entirely, and ſubſtantially even in the ſingle point excepted.

EVERY object, which the editor in the beginning of this long preface promiſed to conſider, is now fulfilled, in the beſt manner, the feebleneſs of his powers and the aggregate of checks upon the exertion of them will allow.

IT only remains to add ſome few words concerning the bulk of this preface.

THOUGH it was begun with deſpondency, in part cauſed by alarm at the largeneſs of the ſubject; yet it by no means occurred to him, that even his inadequate manner of digeſting the materials of information could have led to ſo long a diſcuſſion. On the contrary, even as late as ſix weeks ago, he flattered himſelf, that the preface would not have exceeded half of its preſent ſize.

BUT what was thus intended as a preface, and was too far printed with that name to be retractable, is gradually and almoſt inſenſibly become enlarged into a volume.

FOR

FROM his own feelings, the editor is too well apprized of the chief cauſe of this fault.—He is aware, that there are perſons, who, with the ſame advantage of materials and the ſame induſtry in the uſe of them, would have eaſily managed to avoid ſuch a bulk of preface. It is one of the characteriſticks of genius, to create by extracting, to amplify by reducing, to harmonize by diſtributing, to enliven by diſburthening, to allure by adorning, to impreſs by gratifying, to detain by intereſting, to abbreviate by concentrating, and to convince by combining. Through ſuch powers and ſuch lights and ſh. des of compoſition, the ponderous droſs, which adheres to encircles ſwells and deadens this preface, would be cleared away. Thus the miſt and darkneſs of conſtitutional antiquities would be diſperſed into clearneſs, the abſtraction of juridical hiſtory would be embelliſhed into agreableneſs, the copiouſneſs of materials would be analized into ſhortneſs, and the dryneſs of information would be ripened into the fulneſs of conviction.—But to this elevation of writing, the prefacer is a ſtranger. His humble proceſs conſiſts of the reiterations of induſtry. What himſelf with difficulty conceives and obtains, he with like difficulty prepares for communication: and his chief claim upon his readers now is, as it has been upon former occaſions, the ſincerity of his zeal to contribute to their information, upon ſuch ſerious topicks, as are within the limited ſphere of his ſtudies and experience. It is for inferior workmen, ſuch as himſelf, to dig the clay and to embody it. To light the Promethean torch, and to infuſe ſoul into compoſition, belongs to thoſe of a far higher order. Such ſuperior perſons might be expected to analize the deep and copious reaſonings of lord Hale into compreſſion. Poſſibly alſo the ſame perſons

might flaſh the mind into a conviction,—that the grand juriſdiction of the lords, ſo boaſtingly exhibited by Prynne as *inherent univerſal* and *ſupreme*, was a mere concretion, of the antiently conſtituted and antiently aboliſhed juriſdiction of the king's *concilium ordinarium*, and of the recently conſtituted and recently aboliſhed ſtar-chamber juriſdiction of the ſame council :—that whilſt this expired juriſdiction ſubſiſted, as on the one hand it was only exerciſeable by the houſe of lords as *mixing* with and blended into the *concilium ordinarium*; ſo on the other hand it was equally *derivative* from the *crown*, and *ſubordinate* to the WHOLE PARLIAMENT :—that Prynne's proud manſion of omnipotent juriſdiction is only the mauſoleum of departed judicature :—that the grand *original* juriſdiction, which Prynne attributes to the LORDS, is a non-entity :—and that the lofty *appellant* juriſdiction, which they really poſſeſs and exerciſe, was neither ſo antient, nor ſo extenſive, nor ſo pre-eminent, nor ſo unqueſtionable, as Prynne aſſerts; but yet is NOW BECOME firmly fixed upon the ſolid rock of conſtitution; and is at the ſame time ſo high and mighty, as to be only ſuperviſable and controulable by the interpoſition of that FULL and WHOLE PARLIAMENT, of which themſelves are an INTEGRAL and ESSENTIAL member.

FRANCIS HARGRAVE,

APRIL 29, 1796.

NOTE

NOTE belonging to Page clxxxiv.

(*kkk*) See Journ. Dom. Proc. 22. March 1693-4. 14. April & 27. Nov. & 4. 5. 12. & 22. Dec. 1694.

What followed upon this caſe of Charles Knollis eſquire claiming to be Earl of Banbury and Viſcount Wallingford deſerves attention. The criminal proſecution of him was not further proceeded in; the crown neither chuſing to try the judgment upon a writ of error, nor to give way to the claim of peerage by having him indicted by the title of Earl of Banbury. On the other hand he perſevered in his pretenſions to the titles, and always aſſumed the title of Earl.

In 1697, his claim was ſo far liſtened to, that his petition of claim was referred by the crown to the houſe of lords: and thence perhaps it may be preſumed, that the caſe had been laid before the king's attorney general or ſolicitor general, and that the report of that officer was not wholly unfavorable to the claimant. But notwithſtanding this regal call upon the lords to exerciſe their *conſultive* function, they were inflexible; and inſtead of examining the juſtice of the claim, they referred it to a committee to draw a repreſentation of the former proceedings of the houſe in order to have it preſented to the king. The lords committees made their report: and after reading it and hearing lord chief juſtice Holt and judge Eyre, there was a debate. But it ended with an order, adjourning the matter for four days, and directing the two judges of the king's bench and one judge of each of the other courts to attend on the adjourned day. Yet when the latter day came nothing was done. Thus the proceeding terminated in the houſe of lords, without either their acting upon the reference from the crown, or their condeſcending to inform the crown of the reaſon of ſo declining to perform their function. See Journ. Dom. Proc. 26. & 29. Jan. & 7. & 10. Feb. 1697-8. Such a declining of the caſe was the more extraordinary, as very ſtriking circumſtances concurred in favour of the claim.

The queſtion upon it was, whether Nicholas Knollis the father of the claimant was really the ſon of William Knollis the firſt Earl of Banbury.

Againſt the claim in this reſpect, the circumſtances ſtated are, the great age of the firſt Earl, being between eighty and ninety at the birth of the claimant's father; - the character and ſuſpicious conduct of the firſt Earl's ſecond wife, the mother of Nicholas Knollis;—an office finding the firſt Earl's death without iſſue, with ſome paper of the mother, in the nature of a certificate or acknowledgment, as it ſhould ſeem, that the claimant's father and his elder brother who died without iſſue were not the children of the firſt Earl;—and a reſolution of the lords againſt the pretenſion of Charles Knollis the claimant in 1692 3. See 2. & 3. Dugdale's Baronage 413. & Journ. Dom. Proc. 17. Jan. 1692 3.

On the other hand the claim had many things to ſuſtain it.

1. There was the evidence of the birth of the claimant's father and of the father's elder brother in the lifetime of the firſt Earl, and of the firſt Earl's cohabiting with the counteſs his ſecond and laſt wife, and of his being well enough to ride abroad hawking and hunting: and to prove this four witneſſes appear to have been examined.

2. The office finding the firſt Earl's death without iſſue was encountered by a ſecond office finding the contrary.

3. The claimant's father was allowed to take his ſeat in the convention parliament, and to continue ſitting for ſome months without objection; and when objection was taken, it went off without hearing. See Journ. Dom. Proc. 13. July 1660.

4. The claimant's father, finding himſelf not ſummoned, petitioned the king for a writ of ſummons; and the king referred it to the lords; and after hearing counſel on each ſide at the bar of the houſe on one day and a long debate of the lords on another, the caſe was referred to the committee for privileges; and the lords committees reported, that the petitioner was in the eye of the law ſon of the firſt Earl, and that *the houſe of lords ought to adviſe the king to ſummon the petitioner*. Journ. Dom. Proc. 6. June. 1. 9. 10. 19. & 25. July. & 28. Nov. 1661.

5. The houſe, inſtead of hearing the caſe on the report of the committee, adopted the violent meaſure of permitting a bill, declaring the petitioner of 1661 illegitimate, to be read the firſt time: but the bill was not proceeded on with effect.

6. In

6. In 1669, it appearing on a call of the houſe of peers, that the Earl of Banbury's name was omitted in the liſt, the houſe referred it to the committee of privileges to examine why his name was omitted, "he having formerly ſat as a "peer;" and this raiſes ſome ſuſpicion, that there was at leaſt for the time conſiderable diſſatisfaction at the omiſſion of him. Journ. Dom. Proc. 26. Oct. 1669.

7. Under this encouragement the claimant's father as ſon and heir of the firſt Earl of Banbury appears to have petitioned the lords for a writ of ſummons; and the houſe ſo far yielded, as to refer it to the committee of privileges. Journ. Dom. Proc. 23. Feb. 1669-70.

8. Nicholas Knollis, who had thus once ſat as Earl of Banbury, dying, the claimant Charles his ſon and heir, upon coming of age and not being ſummoned, petitioned the lords to repreſent his caſe to the king: and the houſe ſo far attended to the claim, as to refer it to the committee of privileges to report, and upon their report ordered a hearing of counſel for and againſt the claim. Journ. Dom. Proc. 10. & 23. June 1685.

9. In 1692, when the claimant Charles Knollis renewed his petition to the lords and counſel were heard for and againſt his claim, the houſe refuſed a motion to hear the opinion of the judges on the caſe; whence it ſhould ſeem, as if there was an apprehenſion that if they were heard, their opinion would be for the claimant. Journ. Dom. Proc. 13. Dec. 1692. 9. 14. & 17. Jan. 1692-3.

10. The refuſal to hear the judges on the caſe of the claimant Charles Knollis, cauſed a proteſt of ſeventeen peers. Journ. Dom. Proc. 17. Jan. 1692-3.

11. The deciſion of the houſe againſt the ſame claimant on his laſt petition, was proteſted againſt by twenty peers. Ibid.

Thus it appears, that the claim of Charles Knollis to the Earldom of Banbury not only was founded upon the actual poſſeſſion of his father, and when his father's legitimacy was queſtioned was fortified by very ſtriking evidence in favor of it; but at one time received the deciſion of a committee of the lords in its favor. Thus too it appears, that though the claim was finally rejected, yet it was againſt the ſenſe of a great number of peers, and upon a proteſtation by twenty of them, and under ſuch circumſtances, as go far toward inducing great probability,

bility, that *had it not been refuſed to hear the judges*, the claimant would have had the opinion both on the fact and the law of the caſe with him.

From theſe views of the caſe, it ſeems, as if this claim of the Earldom of Banbury had been treated with peculiar rigor; and as if the claim had at laſt miſcarried, becauſe it was oppoſed by ſome violent prejudices, which were ſuffered ſo to operate as to prevent a cool and impartial conſideration. The conſequence of the rejection of the claim countenances this conſtruction of the proceedings of the lords: for it is remarkable, that from the rejection of the claim in 1692 to the preſent moment, there has been, not only an unmoleſted and uniform aſſumption of the Earldom by the head of the family and of the Viſcounty by his eldeſt ſon for the time being, but ſo ſtrong an impreſſion in favor of the right, as to induce a general acceptation of them by the titles ſo aſſumed. As the prefacer underſtands, this ſort of poſſeſſion of the titles of Earl and Viſcount has been even countenanced in ſome degree by the deſcription of recent commiſſions from the crown. Nay, an idea even prevails, that if the head of the family for the time ſhould be ſued or proſecuted as a commoner, it would probably again cauſe a plea of miſnomer and be followed with the ſame ſucceſs, as ſo conſpicuouſly attended the plea, when the replication of the order of the lords rejecting the claim of peerage was adjudged againſt by the king's bench a century ago.

The prefacer has been unexpectedly carried into this long note by an impreſſion of the hardſhip of the order rejecting the claim of the Earldom of Banbury in 1692. If it ſhould have the effect of promoting or aſſiſting any reviſion of the caſe, the interruption, which it has cauſed in the cloſe of the prefacer's narrative of judicature in parliament, will, ſo far as the prefacer is ſingly concerned, be compenſated.—Concerning this caſe of the Earldom of Banbury, ſee beſides the references already made the Caſe printed for the claimant in 1685, and the new Caſe printed for him in 1697.

JURISDICTION

JURISDICTION

OF THE

LORDS HOUSE OR PARLIAMENT.

CHAP. I.

CONCERNING THE ORIGINAL OF JURISDICTION, AS IT STANDS BY LAW OF THIS KINGDOM.

ALL juriſdiction in this kingdom, as well in matters eccleſiaſtical as civil, is originally derived from the crown.

THOSE juriſdictions in reſpect of the matter of them are diſtinguiſhed into theſe two, eccleſiaſtical and civil; and both are uſually called courts.

IN reſpect of the manner of their tranſlation, and the fixedneſs or temporarineſs of their exerciſe, they are variouſly ſtiled. I ſhall direct and apply myſelf to thoſe that are uſually ſtiled civil juriſdictions.

Of theſe ſome are univerſal; not only in reſpect of limits or bounds, becauſe they extend over the whole kingdom and the dominions thereunto belonging; but alſo in the ſubject matter of their juriſdiction. And ſuch only is the high court of parliament, conſiſting of the king himſelf, the lords and commons convened in parliament by the king's writ or ſummons.

Some again, though univerſal in the extent through the whole kingdom, are yet by cuſtom or acts of parliament limited in reſpect of the matter of their juriſdiction. Such are the four great courts; the king's bench, chancery, common pleas, and exchequer.

And although law and uſage hath eſtabliſhed the juriſdiction of theſe courts; yet the actual exerciſe of this juriſdiction is conferred upon the judges, that exerciſe it, by the king's writ or commiſſion, or ſomewhat equivalent thereunto, as to the chancellor by patent, to the keeper of the great ſeal by the king's delivery thereof and a record made of it, to the chief juſtice of the king's bench by writ, to the reſt of the judges of that and other courts by commiſſion under the great ſeal.

There are other courts of more reſtrained juriſdictions: whereof ſome are not courts of record, as the county courts and courts baron; ſome are courts of record as to ſpecial purpoſes, as the ſheriff's turn, courts leets; others to all intents courts of record. And of theſe ſome are more immediately the king's courts, and exerciſed by his commiſſions; as courts of oyer and terminer, gaol delivery, aſſize and niſi prius, peace, ſewers, &c. Some again, though primitively derived from the crown, yet are ſettled by a kind of propriety in other perſons, as corporations, and yet are nevertheleſs the king's courts, and ſo ought to be ſtiled, and their errors in proceedings regularly examinable by the king's writ in the king's bench.

And

And there are beſides,—Courts by charter. Such were the courts of the county palatine of Lancaſter, and the courts of moſt corporations.—Courts by preſcription. Such were the courts of the county palatine of Durham and Cheſter, the royal franchiſe of Ely, and the courts of divers corporations and liberties. And although theſe courts by cuſtom or preſcription have no immediate charter from the crown now extant: yet, in preſumption of law, they are derived from the crown by ſome charter granted before time of memory, and are the king's courts; and regularly there lies an appeal from them to the king in his bench by writ of error, and ſometimes by *certiorari*.

So that, upon the whole account, all juriſdiction is derived from the crown, as is above ſaid; though the actual exerciſe thereof is performed by ſubſtitutes mediately or immediately thereunto appointed by the crown.

CHAP. II.

OF THE SEVERAL COUNCILS OF THE KINGS OF ENGLAND.

MONARCHICAL government is of two kinds, viz. ſimple, and abſolute and unlimited with any qualifications (and ſuch as this is now rarely to be found in any kingdom, unleſs with thoſe Eaſtern princes, where their wills are uncontroulable laws) or qualified at leaſt in ſome points of government, as in making of laws and impoſing of taxes or altering properties.

AND thoſe qualifications are ſometimes ſettled by the original compact between the governors and governed, or by ſettled uſage and cuſtom, or by conceſſions made to the people by the prince or capitulations made between them.

BUT be the monarchy of what kind ſoever, it is not poſſible for the prince, in his own perſon alone without aſſiſtance, to manage all the parts of government, no more than he can be of force alone without the aſſiſtance of his ſubjects or auxiliaries to manage a war.

THE two great parts of adminiſtration of civil government conſiſt, 1. In the deliberative part thereof, or that of council conſultation and advice. 2. In the executive part thereof; which, though it conſiſts of diverſe other particulars, yet principally conſiſts in that which I have mentioned in the former chapter, namely, the exerciſe of juriſdiction. In both which, though the king under God be the ſupreme governor and fountain; yet it is neceſſary for him to call in others *in partem ſollicitudinis*, and, as to uſe their aſſiſtance in the executive part, ſo to have their advice and council in the deliberative part of his government.

AND

AND therefore even in thoſe monarchies, where the application is made in moſt caſes by immediate petition or delation to the crown, as in Portugal, Spain, and ſome others, as I have heard, the king has his ſelect great council, which, in caſes that are capable of diſpatch in particular ſubordinate councils or juriſdictions, diſtributes thoſe petitions to the inferior ordinary councils or courts. Some footſteps whereof, we ſhall hereafter, in the proſecution of this argument, find anciently practiſed by that *conſilium ordinarium* here in England, as will more appear hereafter.

THE kings of England, beſides ſome councils of leſs moment, had eſpecially four kinds of councils.

I. THEIR *conſilium privatum et aſſiduum*, now commonly called the privy council; certain ſelect perſons of the nobility and great officers of ſtate ſpecially called and ſworn, with whom the king uſually adviſeth in matters of ſtate and government. This is barely a council of advice, and regularly hath no conuſance of cauſes or juriſdiction farther than by acts of parliament. But of this, as not to my preſent purpoſe, I ſhall ſay no more in this place.

II. THE *conſilium ordinarium*, which for the moſt part was that, which is generally mentioned in acts of parliament under the name of *conſilium regis* and *coram rege et conſilio*, whereof there were none members but thoſe that were thereunto called by the king. Yet generally in ancient times theſe perſons were called to and members of that council, viz.—1. Commonly and generally all thoſe, that were members of the privy council.—2. The great officers and miniſters of ſtate, as the chancellor, treaſurer, lord ſteward, lord admiral, lord marſhal, the keeper of the privy ſeal, chamberlains of the houſehold, chancellor to the exchequer and duchy, which were likewiſe moſt

moſt commonly of the privy council.—3. The maſter of the wardrobe, treaſurer and comptroller of the houſhold, chamberlains of the exchequer.—4. The judges of both benches, barons of the exchequer, divers maſters of the chancery, the king's ſerjeant and attorney-general; and from the mixture of thoſe it was many times called *legale conſilium.*—5. Sometimes were added the judges itinerant, maſter of the rolls, and other men of prudence ability and experience in buſineſs of importance.

INDEED it was a conſtellation or collection of perſons fitted to adviſe upon ſeveral occaſions; and when they were called together, it was ſtyled *plenum conſilium*, as many times happened upon great and important occaſions. But when the buſineſs were of a more contracted nature, and fell more ſpecially under the cognizance of ſome of this council, then thoſe were called to it that were the fitteſt to adviſe about it; as the chancellor and judges, when the advice concerned matters in law; the treaſurer of England, chancellor of the exchequer, chamberlains, treaſurer and comptroller and ſteward of the houſehold, concerning the ſtate of revenue and houſhold and the like.

AND theſe, eſpecially the chancellor, treaſurer, keeper of the privy ſeal, judges and barons of the exchequer, were uſually part of the conſtituents of this *conſilium ordinarium*, as appears by infinite records. *P.* 35. *E.* 1. *coram rege rot.* 45. *M.* 42. *E.* 3. *coram rege rot.* 30. 39. *rex.* *P.* 43. *E.* 3. *rot.* 72. *rex.* *Clauſ.* 19. *E.* 3. *p.* 2. *m.* 27. *dorſ.* *Clauſ.* 19. *E.* 3. *m.* 8. *dorſ.* *M.* 33. 34. *E.* 1. *coram rege rot.* 50. when the king of Scots did his homage. *T.* 24. *E.* 3. *rot.* 32. *coram rege*, when Otto de Holland was ſentenced for the eſcape of the conſtable of France.

AND this ſeems to be that council, which is frequently mentioned in the parliament rolls and elſewhere, when petitions were directed generally *al roy et ſon councell, ou al councell le roy*; and when proceſs iſſued

iſſued to call men *coram conſilio*, ſometimes by ſubpœna under the great ſeal, ſometimes by letters under the privy ſeal, whereof there were frequent complaints in parliament. Though ſometimes *conſilium regis* had alſo another ſignification, as ſhall be ſhewn hereafter.

III. BESIDES this *conſilium ordinarium*, which took in the privy council ordinarily into their number, ſo there was the *magnum conſilium*, or the lords ſpiritual and temporal; which alſo had the *conſilium ordinarium* annexed as it were to them, as a council within a council, or a council added to a council, and ſometimes had alſo an annexation of many more to them.

AND this *magnum conſilium* was of two kinds; viz. a *magnum conſilium* out of parliament, and a *magnum conſilium* in parliament.

THE former of theſe was commonly upon ſome emergent occaſions, that either in reſpect of the ſuddenneſs could not expect the ſummoning of parliament, or in reſpect of its nature needed it not, or was intended but preparative to it.

THE uſual form of the ſummons was this. *Rex venerabili in Chriſto patri R. Cantuariæ archiepiſcopo, &c. Quia ſuper quibuſdam arduis negotiis nos et ſtatum regni noſtri Angliæ ſpecialiter contingentibus, vobiſcum et cum cæteris prælatis et magnatibus dicti regni apud Weſtmonaſterium die Auguſti proximo futuro colloquium habere volumus et tractatum, vobis in fide et dilectione, quibus nobis tenemini, mandamus, firmiter injungentes, quòd, rebus aliis prætermiſſis, dictis die et loco perſonaliter interſitis nobiſcum et cum cæteris prælatis et magnatibus ſuper præmiſſis tractaturi veſtrumque conſilium impenſuri; et hoc, ſicut nos et honorem noſtrum et defenſionem et ſalvationem dicti regni noſtri diligitis, nullatenus omittatis. Clauſ.* 16. *E.* 3. *parte* 1. *m.* 39. *dorſ. et conſimilia brevia aliis.*

BUT

BUT the form of theſe great councils ever varied. For ſometimes only ſome few of the prelates and nobility were called to it, and none of the *conſilium ordinarium*, as *Clauſ.* 33. *E.* 3. *m.* 10. *dorſ.* At other times not only the nobility prelates and *conſilium ordinarium* were called; but alſo there went out writs to every ſheriff to return one knight for each county, and to divers cities and boroughs to return one citizen or burgeſs, as was done *Clauſ.* 27. *E.* 3. *m.* 12. *dorſ.* upon the making of the ordinance for the ſtaple.

BUT this *magnum conſilium* had nothing of legiſlative power nor juriſdiction; and therefore the ordinances of the ſtaple were after enacted by parliament to ſupply the defect of a law. I never yet ſaw any private petition or any footſteps of juriſdiction exerciſed in ſuch a grand council.

THESE grand councils have been rarely ſummoned of late years; buſineſſes of ſtate being uſually diſpatched by the privy council, and if of very great importance in parliament. The only grand council, that hath been in my remembrance, was that at York, at the coming in of the Scots.

THE ſecond kind of *magnum conſilium*, that in records is mentioned and ſtyled by that name, is the lords houſe in parliament; whereof the lords ſpiritual and temporal were the principal conſtituents, though they had in conjunction with them uſually the *conſilium ordinarium* beforementioned.

ALTHOUGH the ſtyle of *magnum conſilium* is in many records applied and applicable to the whole body of the parliament, as it conſiſts of both houſes; yet it is very frequently in the records of parliament applied to the lords houſe only as joined with the *conſilium ordinarium*. This appears by infinite inſtances, eſpecially in the parliament rolls of

of 50. and 51. E. 3. where oftentimes as well the petitions of the commons as of private perſons are anſwered, *ſoit monſtre al grand councell*, or *le roy ent ferra par adviſe de grand councell.* And petitions in parliament, that were committed to the *conſilium ordinarium*, are many times in caſes of weight anſwered, *ſoit monſtre al grand councell*, or *coram magno conſilio*; and ſo the petitions with ſuch anſwer indorſed delivered over to the lords houſe, as we ſhall ſee hereafter.

BUT although in many caſes this *magnum conſilium*, or the houſe of lords, either with the *conſilium ordinarium*, which was always preſent with them in parliament, or at leaſt with their advice, did tranſact and exerciſe many points of juriſdiction, as in the following chapters will appear; yet they could not make laws without the conſent of the king and the houſe of commons in no age whereof we have any memorials of record extant.

IV. THERE is alſo the *commune conſilium*, which conſiſts of both the houſes of parliament; which together with the king is the higheſt and greateſt court in England, and hath a plenitude of power as well legiſlative as deliberative and executive, or power of juriſdiction in its full comprehenſion. But without the king's conſent the two houſes have no legiſlative power; neither can the king make laws without the conſent of both theſe houſes. They are indeed the higheſt and greateſt council of advice and deliberation. But as to making of laws, the king's *le roy le voet* or ſome word equivalent gives it the complement and perfection of a law.

THE two eſſential parts of this *commune conſilium* are the two houſes of lords and commons. And the conſtituent parts thereof are the three eſtates of the kingdom; though they are not there perſonally, yet virtually and in point of repreſentation: viz. the nobility or ſecu-

lar lords, the ſpiritual lords which are the repreſentative of the clergy, and the commonalty.

For theſe three, viz. the nobility, clergy, and commonalty, are the three eſtates of the kingdom. The king comes in upon a higher denomination and title; namely, the head of theſe three eſtates. And therefore they, that have gone about to make the king one of the three eſtates, are miſtaken, as will eaſily appear to any, that will but read the records fully, being, viz. *Rot. parl.* 9. *H.* 5. *n.* 15. the concluſion of the peace between the kings of England and France by the king's command in parliament 2 May, 9. H. 5. read *coram tribus ſtatibus regni, viz. prælatis et clero, nobilibus et magnatibus, et communitate regni Angliæ*, and by them aſſented unto. *Rot. parl.* 3. & 4. *E.* 4. *n.* 23. *le roy et les trois eſtates.* *Rot. parl.* 13. *E.* 4. *n.* 16. & 17. *domino rege et tribus ſtatibus regni ſtantibus in eodem parliamento.* And in the firſt parliament of the uſurper R. 3. who would be ſure to want no formality to countenance his uſurpation, *rot. parl. n.* 1. *titulus regius*, there is recited an inſtrument allowing him to be king before his coronation was declared in the name of the three eſtates of this realme of England, viz. the lords ſpiritual and temporal and commons. "Bee it ordained," that "the tenour of the ſayd rolle, with all the con-"tynue of the ſame, preſented as is aboveſaid, and delivered to our "beforeſaid ſouverain lord the king, in the name and on the behalf of "the ſayd thre eeſtates out of parliament, now by the ſame three eſtates "aſſembled in this preſent parlement, and by auctorite of the ſame, bee "ratifyed enrolled recorded *," &c. This, though done in a time of uſurpation, yet ſufficiently evidenceth what the three eſtates were.

And the objections againſt it, 1. that two of thoſe three eſtates are conſtituents of the lords houſe, and ſo muſt outbalance the commons, which are but one of the three eſtates; and 2. that the lords ſpiri-

* This extract is corrected from the printed roll of parliament.—Editor.

tual

tual by this means ſhould have a negative voice upon the lords temporal and commons, and ſo no law could be made without the conſent of the major part of the ſpiritual lords and the major part of the temporal lords, as well as the moſt part of the commonalty: I ſay, theſe objections are vain. For though it be true, that two of the three eſtates are conſtituents of the lords houſe; yet they conſtitute but one houſe. And the laws and cuſtoms of the kingdom, which are the true meaſure of all bounds of power, have given a negative voice of either houſe upon the other, and of the king upon both; but have not given a negative voice of only one of the two eſtates conſtituting the lords houſe unto the other, or to the commons being the third eſtate; the legiſlative power being lodged in the king with the aſſent of the two houſes of parliament as ſuch, and not with the aſſent of the three eſtates ſimply conſidered as ſuch; for it is the ſettled conſtitution and cuſtom of the kingdom, that fixeth and defineth, where the legiſlative power is lodged, not notions and fancies.

THE convention of parliament is by the king's writ, whereof there are at this day four ſorts. 1. One to each biſhop and each peer. 2. One to each member of the *conſilium ordinarium*, which the king pleaſes to call as aſſiſtant, *de quo infra*. 3. One to the ſheriff of each county to elect knights of the ſhire and burgeſſes or citizens for boroughs or cities. The procurators for the clergy are directed to be choſen by the writ to the biſhops *præmunientes decanum et capitulum et archidiaconos et totum clerum veſtræ dioceſeos*. 4. To the conſtable of Dover-caſtle for chuſing two barons for each of the cinque ports.

THE writ of ſummons to the lords ſpiritual or temporal commonly runs thus.

REX *archiepiſcopo, &c. Quia de adviſamento conſilii noſtri ordinavimus, quòd ſuper arduis et urgentibus negotiis, tam nos, quàm defenſionem regni noſtri et eccleſiæ Anglicanæ, contingentibus, quoddam parliamentum apud*

W. die teneatur, et ibidem vobiſcum et cæteris prælatis proceribus et magnatibus dicti regni noſtri Angliæ colloquium habere et tractatum: vobis in fide et dilectione, quibus nobis tenemini, firmiter injungendo mandamus, quòd, omnibus aliis prætermiſſis et excuſatione quácunque ceſſante, dictis die et loco perſonaliter interſitis nobiſcum et cum cæteris prælatis magnatibus et proceribus prædictis ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri. Et hoc, ſicut nos et honorem noſtrum diligitis, nullatenus omittatis.

THE form of the writ to the temporal lords is much of the ſame form.

THE writ to the ſheriff for election of knights and burgeſſes differs in words but not in ſenſe from that to the lords, viz. *Tibi præcipimus quòd de comitatu prædicto duos milites, &c. ita quòd iidem milites, &c. pro ſe et communitate comitatûs prædicti et cives, &c. plenam et ſufficientem poteſtatem ab ipſis communitatibus habeant ad conſentiendum hiis, quæ tunc per nos et dictos prælatos proceres et magnates ordinari contigerit, &c.*

THE writs for ſummoning of the privy councillors and judges until the 28. E. 1. differed from the ſummons of the lords; for they did run thus: *tractare nobiſcum et cum cæteris de conſilio noſtro, veſtrumque conſilium impenſuri; ideo mandamus, &c. quòd dictis die et loco perſonaliter interſitis nobiſcum, et cum cæteris de conſilio noſtro ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri.*

AFTER that time until about 20. E. 1. the writs to the council ran moſt commonly in the very ſame words with that to the lords: *nobiſcum et cum prælatis magnatibus et proceribus tractaturi, veſtrumque conſilium impenſuri*, inſtead of *cæteris de conſilio.*

AFTER 20. E. 3. till 46. E. 3. the writs to them ran moſt commonly in the antient form: *nobiſcum et cum cæteris de conſilio noſtro tractaturi,*

tractaturi, &c. though ſometimes by the inadvertence of the clerk of the crown they ran in the ſame form with thoſe to the lords.

BUT from 46. E. 3. down to this day the ſummons to the members of the privy council judges *conſilium ordinarium* hath gone in the antient form, *nobiſcum et cum cæteris de conſilio noſtro*, not *nobiſcum et prælatis proceribus et magnatibus*, unleſs it were to ſuch of the council as were alſo lords of parliament; whereby the diſtinction between the lords of parliament and the *conſilium ordinarium*, and the difference of their power and deliberation, is manifeſtly preſerved.

THE title of *dominus* in the writs to the lords was in antient times very rare. But it was directed *Willelmo de Gray chivaler*, and ſo in other writs at common law, 8. H. 6. 9. 10. And the reaſon, as given by the old books, is, becauſe the king writes to none of his ſubjects by the name of lord. But in Hen. 6th's time this was altered in many caſes; for divers of the nobility are ſummoned by the names *dominus de Say, dominus de Ferrars, &c.*

ALTHOUGH I intend not to proſecute the handling of the whole matter touching parliaments, but principally the juriſdiction of the lords houſe and *conſilium, &c.* yet the former obſervations will be of uſe in the ſequel of this diſcourſe or hiſtory.

CHAP.

CHAP. III.

CONCERNING THE SEVERAL STILES OF PARLIAMENT AND *CONSILIUM REGIS.*

THE titlings of ſeveral courts and their ſtiles are neceſſary, that perſons may know, where proceſs directs them to appear, and that it may be thereby known in what court buſineſſes are tranſacted.

AND therefore the four great courts of Weſtminſter have their ſeveral ſtiles, which are conſtantly uſed in proceſſes and titlings of records: as, *coram nobis ubicunque fuerimus in Anglid*, the ſtile of the king's bench; *coram nobis* and ſometimes *coram nobis et conſilio in cancellarid*, the ſtile of the chancery; *coram juſticiariis noſtris apud Weſtmonaſterium*, the ſtile of the common pleas; *coram baronibus* and ſometimes *coram theſaurario et baronibus*, the ſtile of the exchequer.

BUT the ſtiles of the *conſilium ordinarium*, and of the great court of parliament conſiſting of the king lords and commons and of the lords houſe, are ſo variouſly and promiſcuouſly uſed, that it cauſeth great difficulty in determining, whether the proceedings be in the one or the other, with great attention and obſervation of the whole record, in which ſuch ſtiles are uſed, unleſs in ſome ſpecial caſes.

AND this uncertainty is occaſioned, partly by the inadvertence of the clerks that made the ſeveral entries of record; ſome being made up by the clerks of the council, ſome by the clerk of the crown, and ſome by the clerk of the parliament of the lords houſe; and theſe latter, being often changed, and ſometimes it may be too partial to the houſe of lords, where they were appointed by the king and made up

up their records, ſometimes drew up the records of that houſe in the very ſtile of the parliament in general.

THIS diſquiſition therefore, viz. where or in what court the proceedings under theſe ſeveral ſtiles were, requires the conſideration of the whole record and the circumſtances and matter thereof, and not barely of the ſtile; and if any but peruſe the *placita parliamentaria* of 1. E. 1. now printed by mr. Ryley, which I ſhall often mention for brevity's ſake by the name of Ryley, he ſhall find plentiful inſtances of this kind.

1. OUT of parliament a proceſs returnable, or a matter recorded to be, *coram rege et conſilio*, or *coram conſilio*, or *de adviſamento conſilii noſtri*, *&c.* is intended oftentimes of his privy council, as in the very writ of ſummons of parliament, *quia de adviſamento conſilii noſtri parliamentum ordinavimus*; or ſometimes of the *conſilium ordinarium*, as in the writ *de idiotâ examinando*, and the frequent proceſs that many times iſſued *ad comparend. coram nobis et conſilio*, or *coram conſilio*, under the great or privy ſeal, though often complained of. *Vide* ſuch a writ granted in parliament againſt John Tayllard to appear *coram nobis et conſilio, rot. parl.* 8. *H.* 5. *n.* 8. *et ſequentibus.* But of this more hereafter.

2. AND ſo when a thing is recorded to be done out of parliament time *coram toto conſilio*, it is intended of a full council or *conſeſſus* of the *conſilium ordinarium*; though it ſometimes takes in the whole upper houſe.

3. IN parliament time there uſually is added *coram rege in conſilio in parliamento.* And very often it ſignifies no other but the *conſilium ordinarium*, as might appear by many inſtances. And the ſame is often intended by *coram conſilio in parliamento.* But ſometimes it is intended of the lords houſe and the *conſilium ordinarium* in conjunction

tion in parliament, and ſometimes the lords houſe ſingly. In the caſe of the archbiſhop of York and biſhop of Durham, Ryley, pag. 140. *propter quòd per comites barones juſticiarios et omnes alios de conſilio ipſius domini regis unanimiter concordatum eſt, quòd prædictus archiepiſcopus committatur priſonæ pro tranſgreſſione et offenſâ prædictis, &c.* Ryley 266. In the caſe of Segram *et rex, Dominus petens habere adviſamentum comitum baronum magnatum et aliorum de conſilio ſuo. Rot. parl.* 5. *R.* 2. *n.* 45. 46. In the caſe of Cambridge riot to appear *coram rege et conſilio in parliamento. Rot. parl.* 1. *R.* 2. *n.* 29. *rot. parl.* 2. *R.* 2. *n.* 19. 26. In the caſe of the petition of error by the earl of Saliſbury againſt Mortimer the record is deſired to be removed *coram rege et conſilio:* yet the proceeding and judgment by the lords *de aſſenſu regis. Clauſ.* 1. *E.* 3. *parte* 1. *m.* 21. *dorſo* the petition of the earl of Lancaſter to the king nobles and council, but ſtiled to the king and his council. And ſometimes it is applicable to both houſes; but moſt commonly to the lords houſe. Yea ſometimes we ſhall find, and that very often, that the ſtile *coram nobis et conſilio* generally in parliament time is intended of the lords houſe, as appears by the precedents thereof in the writs of the king or petitions of error in the lords houſe.

4. CORAM *nobis in parliamento* is moſt commonly applicable to the houſe of lords. Thus the writ of error runs at this day, and infinite records more. Yet it ſeems it is applicable ſometimes to both houſes. *Rot. parl.* 8. *R.* 2. *n.* 15. in the petition of error by the prior of Montague againſt Seymour, when the *ſcire facias* was to appear *coram nobis in parliamento*, and the judgment was *videtur curiæ parliamenti* that the judgment was erroneous, which may make it probable that the whole proceeding was by both houſes. When a thing is ſaid to be done in parliament it is conſtrued, according to the ſubject matter, ſometimes of both houſes, ſometimes only the houſe of lords. See *ſt.* 4. *H.* 4. *cap.* 33. *et rot. parl.* 4. *H.* 4. *n.* 78. 10. *H.* 6. *n.* 65. when only the houſe of lords is intended.

5. CORAM

5. CORAM *magno conſilio*, or *coram pleno conſilio* or *toto conſilio*, in parliament rolls is moſt uſually intended of the full houſe of lords including alſo the *conſilium ordinarium* ſummoned thither as aſſiſtants. The record proving it will be mentioned hereafter, when we ſpeak of the indorſement of parliamentary petitions in the lords houſe. *Vide Ryley* 103. *petitionem Willielmi de Valence.*

6. ALTHOUGH in truth the king and both houſes of parliament make the entire ſupreme court of this kingdom; yet very often, in parliamentary records and writs, *curia noſtra in parliamento*, and *curia parliamenti*, is applicable to the lords houſe conſtituted as is above ſhewn. *Rot. parl.* 1. *H.* 5. *n.* 19. the *ſcire facias* upon a petition of error in the lords houſe is *ad audiendos errores et ulterius ad faciendum et recipiendum quod curia noſtra parliamenti conſideraverit*, the caſe of John Gunwardby and Windſor. The like *rot. parl.* 3. *H.* 5. *n.* 19. in the *ſcire facias* upon the petition of error by Richard Caternaine. Yet theſe peradventure were in the lords houſe. Accordingly *rot. parl.* 17. *R.* 2. *n.* 13. 14.

7. WHEN things are ſaid to be done *de communi conſilio in parliamento*, it ſeems to me always to be intended of the expreſs conſent of both houſes in conjunction with the king.

8. WHEN things are ſaid to be done *in pleno parliamento*, it is always intended, where the king and both houſes are preſent, or at leaſt where both houſes are preſent. And very often in ſuch caſes both houſes did actually and expreſſly give their aſſent. Thus in the ſtatute of receipt of the reverſioner upon default of tenant for life, *propter quod dominus rex in pleno parliamento ſtatuit et præcipit*, &c. Ryley 232. in the caſe of Boteler. Ryley 93. in that ordinance (for it was not a ſtatute) for the heir to puniſh waſte in the life of the anceſtor, *habito tractatu in pleno parliamento dominus rex de communi conſenſu ſtatuit*, &c. And among thoſe many inſtances of things done *in pleno parliamento* ſome there are of this nature; though ſome there are,

that, although they import the preſence of the commons as well as the lords, yet do not therefore conclude, that the commons did actually concur therein or expreſſly aſſent thereunto. Therefore it ſeems, that in many caſes things are ſaid to be done *in pleno parliamento*, where though the commons were preſent and did not actually diſſent, yet they did not actually concur as authoritative aſſenters, but at moſt impliedly by their preſence and ſilence. But the very acts themſelves were authoritatively done, ſometimes by the expreſs judgment of the king and lords, ſometimes by the lords alone according to the ſubject matter. Thus the proteſtation of the lords not to judge any perſon but their peers, though made *in pleno parliamento*, was only the act of the lords in the preſence of the commons. *Rot. parl.* 4. *E.* 3. *n.* 6. the judgment given in the caſe of Pagnel, Ryley 232. *Et ſuper hoc recitatâ petitione coram ipſo domino rege et conſilio in pleno parliamento.* Yet the judgment itſelf given by the king and his council and the lords. Thus in the caſe of Segrave, *rot. parl.* 50. *E.* 3. *n.* 27. the authoritative judgment is given againſt him *per aſſenſum comitum magnatum baronum et aliorum de conſilio domini regis in pleno parliamento.* And yet the commons were not parties to the judgment; nor indeed well could be, unleſs it had paſſed by bill, for they were the accuſers, and the judgment given upon their accuſation. And it was always or moſt commonly the courſe, that when the commons accuſed or impeached, and the lords were ready for judgment, the commons had notice, and then came up with their ſpeaker and demanded judgment, which the lords gave moſt commonly by the mouth of their ſpeaker; which courſe was obſerved even to this time. So that it might be ſaid to be done *in pleno parliamento*, both houſes being preſent; and yet the judgment itſelf given by the lords, though in the preſence of the commons, and thus far by their tacit conſent, as being the accuſers and preſent at the judgment. See inſtances of *pleni parliamenti*, and the various applications thereof, *rot. parl.* 4. *E.* 3. *n.* 6. 5. *E.* 3. *n.* 10. 6. *E.* 3. *n.* 1. 13. *E.* 3. *n.* 10. 18. *E.* 3. *n.* 15. 22. *E.* 3. *n.* 65. 25. *E.* 3. *n.* 9. 10. 54. 28. *E.* 3. *n.* 50. *E.* 3. *n.* 27.

9. ALTHOUGH

9. ALTHOUGH, when a thing is recorded to be done *coram conſilio in parliamento*, or *in curiâ parliamenti*, it is often intended of the houſe of lords; yet a thing recorded to be tranſacted or done *per totum conſilium parliamenti* is intended of both houſes. Thus Ryley, p. 381. the ſtatute of Carliſle *ex aſſenſu domini regis et toto conſilio parliamenti prædicti proviſum et concordatum eſt, quòd præmiſſa gravamina non permittantur.* Yet p. 282. in the writ grounded upon that proviſion it was aſſented to *per comites barones alioſque proceres et totam communitatem regni.*

10. WHEN a thing is ſaid to be done *ex aſſenſu parliamenti*, or *authoritate parliamenti* *, it is intended to include the aſſent of both houſes. And yet we find ſometimes the record ſo entered, when in truth the houſe of commons never aſſented; but eſpecially in the committing of petitions delivered in parliament and not there determined; which were uſually the laſt day of the parliament committed, ſome to the *conſilium regis*, and ſome to the chancellor. And this was ſometimes done at the deſire of the commons; and then it was truly *authoritate parliamenti*, for the king and both houſes conſented to ſuch commitment of the petitions there to be finally determined. *Rot. parl.* 42. *E.* 3. *n.* 20. 21. *Rot. parl.* 11. *H.* 4. *n.* 33. *et* 50. *Rot. parl.* 15. *H.* 6. *n.* 33. 6. *H.* 6. *n.* 69. 4. *H.* 6. 2. 21. and divers others.

BUT many times theſe petitions were received and transferred to the council, and very often to the chancellor, without the deſire of the commons; and yet the entry made of the delivery over thereof to their determination *ex authoritate parliamenti*. And by colour thereof, many decrees and determinations of private petitions delivered in parliament, thus referred to the council or often to the chancellor, became as concluſive as if they had been acts of parliament. And therefore *rot. parl.* 8. *H.* 5. *inter petitiones communitatis, n.* 23. *Item*

* *Rot. parl.* 4. *E.* 3. *n.* 11. 12. *Rot. parl.* 21. *E.* 3. *n.* 16. 17. *Rot. parl.* 15. *E.* 3. *n.* 27.

priount les ditz communes en ceſt preſent parlement, que ſi aſcun home ſue bill ou petition et ſoit endoceur per tiel parolls per authority de parlement, ſoit ceſt bill ou petition commiſe a le councell de roy ou al chauncellor d'Angleterre pur executer et determiner contenus en ycelles per l'ou la petition ou bill ne ſoit per commons de parlement requiſe d'etre affirme ne aſſentu, que nullui a nul tiel petition ou bill ſans requeſt et aſſent de commons du parlement endoce, ſoit miſe a reſponder encountre les leyes de realme d'Angleterre. —RESP. *Soit aviſée per le roy.*

THE thing was frequently done and done wrongfully, yet it was not remedied.

ROT. *parl.* 3. *H.* 5. *n.* 19. Richard Catermaine petitioned for the reverſal of a judgment in the king's bench *per agard meme ceſtui parlement, quâ petitione in parliamento ipſo publicè lectâ de aſſenſu ejuſdem parliamenti conſideratum eſt, quòd Richardus habeat ſcire facias returnabile proximo parliamento ad audiendos errores, et ad faciendum et recipiendum quod per legem terræ in curiâ parliamenti contigerit adjudicare.* Here *parliamentum et aſſenſus parliamenti*, and *curia parliamenti.* Yet it was all in the lords houſe, as appears by the petition to the king and lords, *et que pleſe le roy et ſeigneurs commander le recorde d'eſtre ameſne.*

11. AND as thus the titlings and ſtiles of proceeding, that are in propriety applicable to the whole parliament, yet by the inadvertence of clerks are applied to proceedings in the lords houſe; ſo in truth many ſtiles and titlings, that in propriety are not ſo applicable to the whole parliament, yet were the buſineſſes tranſacted and aſſented to by the whole parliament. And for this we need no other inſtances than thoſe given 8. *Rep.* 18. 19, &c. ſome ſtatutes running in form of charters; ſome only in the king's name; ſome *in præſentiâ epiſcoporum et aliorum de conſilio regis*, as the ſtatute of *bigamus*; ſome *de conſilio prælatorum comitum et baronum et aliorum fidelium de regno noſtro de conſilio*

filio noſtro exiſtentium, as the ſtatute *de religioſis*; ſome *de communi aſſenſu et conſilio prælatorum comitum baronum et aliorum de conſilio in præſenti parliamento convocato exiſtentium, dedimus, &c.* as the charter of the Duke of Cornwall reſolved to be by the conſent of the king and both houſes. *Dominus rex ſtatuit*, 7. *H.* 7. 14. 39. *E.* 3. 12.

THUS ſtiles, that in propriety take not in the whole parliament, but are in propriety applicable to the king alone, or to the king and his *conſilium ordinarium*, or to the king and houſe of lords, yet in truth are applied to acts or grants in parliament made by the king and both houſes, and are true acts of parliament. *Vid.* 11. *H.* 7. 27. Upon all which it appears, how difficult it is barely by ſtiles and titlings of records of parliament to conclude, whether the things were tranſacted in one or both houſes, or before the *conſilium ordinarium* only.

AND therefore it is neceſſary in ſuch caſes to obſerve the whole record, the nature of the buſineſs ſo tranſacted, and the whole circumſtances of the caſe, and the conſtant interpretation, acceptance and uſage of ſucceeding times, to give a true concluſion, whether the thing were tranſacted or aſſented to by both houſes, or only by the lords houſe, or the *conſilium ordinarium*.

AND upon this account it may be fit to take notice of thoſe acts or ſtatutes that paſſed *ad petitionem cleri*; whereupon ſome miſtakes have happened; as if binding laws could be made by the conſent of the king and clergy without the conſent of the lords and commons; becauſe many times anſwers are immediately given by the king to theſe petitions without expreſs mention of the conſent of both houſes. Indeed the commons were jealous, that ſome ſuch thing might be attempted by the clergy. And therefore *rot. parl.* 18. *E.* 3. *n.* 8. *Item pryen la commune, que nul petition faite par la clergie, que ſoit en decreſe ou damage des grantz ou de la commune, ſoit grantez, tan qu'il ſoit try par le roy et tout ſon councell, que ſans damage des grantz et de la commune*

mune bonement ſe puiſſe tener. RESPONS. *Il pleſt a roy et a ſon councell qu'en ſi ſoit.*

AND the truth is, theſe petitions never paſſed into a law by any anſwer given to them by the king, till they were alſo aſſented unto by the lords and commons.

ROT. *parl.* 14. *E.* 3. *n.* 11. *Auxi par command noſtre ſeigneur le roy fuerent les petitions de clergy oyes et reſpondues; et ſur ceo eſtatut fait par aſſent de touts.*

AND accordingly it paſſed into a law in the form of a charter, as appears in the printed ſtatute of 14. E. 3. but recited to be with deliberation had by the king with the peers of the realm and other of his council and of the realm ſummoned to the parliament.

AND again when in the parliament of 18. E. 3. there were other petitions of the clergy and digeſted into a law in the form of a charter; yet it was not till they were aſſented and accorded unto in parliament, as appears by the printed book of ſtatutes 18. E. 3. and by the parliament-roll 18. E. 3. n. 24.

AGAIN in the parliament of 25. E. 3. the clergy exhibited a new roll of petitions to the king, which were anſwered and digeſted into a law in the form of a charter. It is plain both houſes were acquainted therewith, as appears *rot. parl.* 25. *E.* 3 *n.* 59. and aſſented to it, as it appears by the charter itſelf printed amongſt the ſtatutes, that it was granted by the king by aſſent of the parliament.

BUT becauſe my purpoſe is not to make any large diſcourſe touching the parliamentary proceedings in general, but chiefly to ſtate the buſineſs of the *conſilium regis ordinarium* and the proceedings in the lords houſe, I ſhall now accordingly proceed in that method.

CHAP.

CHAP. IV.

CONCERNING THE *CONSILIUM REGIS ORDINARIUM*, AND THEIR JURISDICTION.

I HAVE in the former chapter ſhewed of what perſons this *conſilium ordinarium* did conſiſt; and likewiſe that they were a diſtinct body from the grand council and lords in parliament, which might be further evinced by many more records proving it.

THERE have been anciently two opinions concerning this *conſilium regis*.

SOME have thought, that it is the moſt ancient court of ordinary juriſdiction, next to the parliament; and that there was lodged in it the plenitude of all civil juriſdiction; and was as it were the common mother of thoſe great courts, the chancery, king's bench, common pleas, and exchequer; and that the judges, and others, that had juriſdiction in thoſe courts above named, were anciently but as ſo many diſtributions of the members of this council for the better diſpatch of buſineſs and eaſe of themſelves and the people, as it were ſo many ſub-committees or ſub-delegates taken by the king out of this council for that purpoſe; but that ſtill this *conſilium* in its collective body retained their primitive and original juriſdiction.

AND this they endeavour to prove,—1. By the ancient juriſdiction they exerciſed in deciſions of matters civil and criminal, whereof hereafter. 2. By the co-adminiſtration of this *conſilium regis* in theſe other courts, as in chancery. *Vide rot. parl.* 4. *E.* 3. *m.* 2. *dorſ. Soit la petition mand en chauncery, et que le chaunceller illonques appell les ſages du councell le roy ent ſoit droit*; wherefore the petition being read *devant*

devant le chaunceller, treaſurer, juſtices de l'un banck et l'autre, barons d'exchequer, et autres ſages de councell, ſoit aviſe, &c. Many more of this kind I ſhall have occaſion hereafter to mention, *quæ vide infra.*

OTHERS again have thought, that the inſtitution of theſe courts, of chancery, king's bench, common pleas, and exchequer, and the judges appointed to ſit therein, were in truth the primitive juriſdictions next under the parliament: but that for the better accommodation and advice, the judges of theſe courts, the chancellor, treaſurer, juſtices of each bench, and barons of the exchequer, and ſome other principal attendants of places that concerned the adminiſtration of juſtice and king's revenue, were called hither to be parts and members of this council: and therefore, that the council itſelf, as ſuch, had nothing of coercive juriſdiction, but only of advice and deliberation; and that the ordinary juriſdiction belonged to theſe courts themſelves, and the extraordinary or ſupreme juriſdiction, as well in the firſt inſtance as in appeals, belonged to the king and his two houſes aſſembled in parliament. And this they prove by the frequent complaints againſt the juriſdiction exerciſed by the council as an uſurpation and againſt the laws of the kingdom. And ſome acts of parliament have paſſed to the ſame effect.

BUT omitting the enquiry touching the original diſtribution of juriſdictions, which is too antient and obſcure to be diſtinctly deſcribed, I will content myſelf with what appears of record touching theſe matters, and that in the method hereafter ſtated.

I. I SHALL conſider what were the office and buſineſs of this *conſilium ordinarium*, which may be reduced to theſe two heads, 1. its deliberative office, or power of advice: 2. its deciſive power, or power of juriſdiction.

II.

II. I ſhall conſider this *conſilium regis* in its relative nature, namely, with relation, 1. to the court of chancery; 2. to the court of king's bench; 3. to the court of exchequer; 4. to the court of requeſt or privy ſeal; 5. to the court of common bench; 6. to the court of parliament; and what part it did bear in or in relation to them.

TOUCHING the former of theſe, namely, the buſineſs of the *conſilium regis*, which it exerciſed ſimply as ſuch. And firſt concerning its office or employment of advice or deliberation. And this was chiefly of two kinds. 1. Conſultations about affairs of ſtate and public buſineſs; as peace, war, money, truces, leagues, and matters of that kind, when by the king they were called to it: but of this I ſhall ſay no more. And 2. Upon petitions either to the king and ſpecially recommended to them, or petitions to the king and his council, or to the council; for antiently there were the ſtiles of petitions that were conſidered by the council.

AND theſe petitions as to the time or ſeaſon of their preſenting were either out of parliament or in the time of the ſitting of parliament. The former were ſimply ſtiled *petitiones de conſilio*; the latter were ſtiled oftentimes *petitiones in parliamento*: ſome whereof, with the anſwer of the council incloſed, were by private perſons; ſome by the commons in parliament; ſome entered upon the parliament roll; ſome entered in bundles of petitions, whereof ſome are extant in the Tower, but very many be loſt.

THESE petitions were of various kinds and touching divers matters; and it is difficult to range them under ſeveral heads. And touching theſe the council gave their ſeveral anſwers indorſed or ſubſcribed to the petition; but very rarely any thing in point of deciſion or judicature, but only with a recommendation to thoſe proper courts, perſons, or places, where they were naturally and legally determinable. So that it was rather a council of advice preparation and direction, as to thoſe matters ordinarily, than a court of juriſdiction or deciſion.

ORDINARILY the petitions, that came to them, whether in or out of parliament, but eſpecially in parliament, were of ſome of theſe natures.

1. SOME were ſuch as could not have relief without a new law made by act of parliament, either in that particular caſe, or which might by a general purview extend unto it. And then the anſwer given was this, or to the like effect: *il ne poet eſtre fait ſans novel ley ordonne en ceſt caſe.*

2. SOME were of ſuch nature, as the petitioner might have relief by the ordinary courſe of law in the king's ordinary courts. And their anſwer was to this effect, *ſues a la common ley.* And in ſome caſes the petition was ſent by indorſement of the petition, and ſometimes by writ under the great ſeal with the petition indorſed, and ſometimes by writ reciting the purport of the petition, unto the proper court where the cauſe was determinable; as to the chancery, king's bench, exchequer, &c. and frequent inſtances of that kind were anciently. *V.* 2. *E.* 3. 7. caſe of *Johannes Britannia.*

AND indeed till the ſtatute of 5. *R.* 2. *cap.* 9. the uſual way and remedy for perſons impleaded there for the king's debts were, firſt by petition to the council, or at leaſt to the council in chancery; and thereupon writs to iſſue under the great ſeal to make allowances in diſcharge as the caſe ſhould require.

3. SOME petitions of greater moment, or touching greater perſons, or of great difficulty, exhibited to the *conſilium ordinarium*, were ſent over to the lords houſe in parliament. And then the indorſement was *coram magno conſilio*, as we ſhall ſee by ſeveral inſtances hereafter.

4. SOME petitions were ſuch as more immediately concerned the king, which were commonly of two kinds, viz. 1. petitions of grace, as for pardon or diſcharge: 2. or ſuch as concerned immediately his intereſt

intereſt (and in thoſe caſes the anſwer was *coram rege*), which ſometimes were thereupon anſwered immediately by granting or denying them. And ſometimes they were by the king's eſpecial direction ſent unto the proper courts, and moſt ordinarily unto the chancery, with this indorſement, *ſoit droit fait*, as upon petitions of right; and ſometimes were by the king intirely referred to be anſwered by ſome of his council or a committee of them, and ſometimes in parliament time to a ſelect number of lords and judges and great officers of the council finally to anſwer them. Thus it was *dorſ. rot. parl.* 14. *E.* 3. *n.* 28. 29. where beſides the general *auditores petitionum ceux ſont aſſigne de ſeer ſur petitions coram rege*, viz. one biſhop, one earl, one baron, five judges, *aſſocies le chaunceller et treaſurer quant beſoigne ſerra.* And *rot. parl.* 36. *E.* 3. *n.* 31. where it is ſpecially ordered, that the lords and others aſſigned to be *auditores petitionum* may together with the chancellor, treaſurer, and others of the council, anſwer and indorſe all petitions in parliament without making an indorſement *coram rege* only.

THIS directive power of the *conſilium regis* is well deſcribed *rot. parl.* 2. *R.* 2. *parte* 2. *n.* 49.

FOR in *rot. parl.* 1. *R.* 2. *n.* 87. the commons petition, *que quereles inter parties ne ſoient attemptes ne termines par ſeigneurs ne officers de councell, mes que la commune ley courge ſans eſtre tarry par eux eins lieux, ou ils ſoloient d'ancient temps eſtre termines, ſi ni ſoit tiel querele et encounter ſi grand perſon, que home ne ſuppoſe aillours d'avoir droit.*—RESP. *Le roy le voet.*

THE clauſe of this ſtatute confirmed by the king's anſwer *rot. parl.* 1. *H.* 4. *n.* 162. But this was no act of parliament, for the petition was for one thing and the anſwer for another. The petition and anſwer run thus. *Item, ſuppliont les communes, que come en temps de Richard nadgairs roy ad eſte uſe, que pluſours perſoneles actions par outre partie et partie, que puiſſent eſtre determinables par la commune ley d'Engleterre, par maintenance de ceux que ount eſte de counſeill del dit Richard nadgairs roy, pur brocage a eux fait, ils firent venir devant eux*

pluſours des lieges notre ſeigneur le roy par lettres del prive ſeal, al ſuyte de partie illeoques, pur eſtre trie devant lour enemye, de perſonell action determinable par la commune ley d'Engleterre, dont aſcuns actions ſont unquore pendants en diſcuſſion, par mayntenance de ceux que ſont adjuggez a Briſtyyt pur malveys conſeillours, en grande deſtruction des dits lieges noſtre ſeigneur le roy, et en derogation de la corone, et ancintiſſement de la commune ley: Pleſe a noſtre tres redoubte ſeigneur le roy, par advys de ſon tres ſage counſeill, ordeigner en ceſt preſent parlement, que touz manners actions perſoneles par entre partie et partie, dont le roy n'eſt partie, de cy en avant poient etre triez par la commune ley, et nemye devant le counſeill noſtre ſeigneur le roy, par nulle lettre de prive ſeal, ne par nulle autre faux ſuggeſtion quiconque al ſeute del partie : et que touz les actions perſoneles, iſſint pur devant ces heures dependantz devant le counſeill de Richard nadgairs roy, par entre partie et partie, que unquore ſont en diſcuſſe, ſoient adnullez, et adjournez a la commune ley, pur dieu, et en œvre de charitee.

RESP. *Soit l'eſtatut ent fait tenez et gardez, la ou l'une partie eſt ſi graunt et riche, et l'autre partie ſi povre qu'il ne purra autrement avoir recoverer.*

THE truth is, that of 1. *R.* 2. was never drawn into an act of parliament; and this of 1. *H.* 4. could not be drawn into an act, for the anſwer was of a thing not deſired by the petition.

BUT the commons finding the inconvenience of the laſt exception, for under colour thereof many ſuits were brought before the council, endeavoured to ratify it by a more general petition, viz.

ROT. *parl.* 2. *R.* 2. *parte* 4. *n.* 49. *Item ſupplient les communes, que nul brief iſſe hors de la chancellarie, ne lettre de prive ſeal ſoit, direct a nully, pur luy faire venir devant le councell du roy, ou d'autre a reſpondre de ſon frank tenement ou choſes appurtenants a ycelle, come ordene eſtoit avant ces heures; mais ſoit la commune ley de la terre maintenu d'avoir ſon droit cours.*

THE

THE anſwer well deſcribes the directive power of the council abovementioned, but ſubjoins ſomething of juriſdiction, which will be further conſidered hereafter, viz.

RESP. *Il ne ſemble mye reaſonable que le roy noſtre ſeigneur feuſſe reſtreint qu'il ne pourroit pur reſonable cauſe envoier pur ſes lieges, mais ceux, qui ſerront envoies devant le councell, a lour venue ne ſerront mye compelles a y reſpondre finalement de lour frank tenement, eins ſerront d'illoeques convoiez as places ou la roy le demande et le cas requieſt, et mis en le droit cours. Purveuz toutes voies, que a ſuite de partie, ou le roy et ſon conſeil ſerront creablement enformez, que pur maintenances oppreſſions et autres outrages d'aucuns en pays, le commune ley ne purra avoir duement ſon cours, que en tien cas le conſeil purra envoier pour la perſone de qui la plainte eſt faite, pour lui mettre a reſpons de ſa meſpriſion, et en oultre par lour bone diſcretion de lui compeller a faire ſeurtee par ſerement, et en autre manere, ſicome ſemblera mieltz a faire, de ſon bone port, et qu'il ne ferra par lui ne par autre maintenance, n'autre riens, que purra deſtourber le cours de commune ley, en oppreſſion du peuple.* This anſwer mentions their directive power and their coercive power. The former was of great uſe in parliament time to diſburthen the king and his houſes with unneceſſary or unfit petitions, and was oftentimes of great uſe to the ſuitors in putting them in a right courſe of proceeding. But the ſending out proceſs upon ſuch petitions, though no more was done upon them than barely direction, eſpecially out of parliament time, was a great grievance, and often complained of and diſcountenanced by acts of parliament, *de quo* CHAP. XXX.

CHAP.

CHAP. V.

CONCERNING THE JURISDICTION AND COERCIVE POWER OF THE *CONSILIUM REGIS.*

JURISDICTION may be taken two ways. I. Leſs properly for acts of voluntary juriſdiction, which alſo takes in making conſtitutions and orders and ordinances. II. Properly for that judicial and coercive power *in foro contentioſo.*—I ſhall ſay ſomething touching the power of the council in both theſe caſes.

I. TOUCHING ordinances and orders of the council, they were anciently of two kinds.—1. Such matters as the petitions of the commons and by conſent of the lords in parliament were deſired to be ſettled and ordered *par notre ſeigneur le roy et ſon bon councell.* And there were very many of this kind, eſpecially in the times of *E.* 3. where the commons ſhewed their grievance, but, not being fully adviſed concerning the remedy, deſired the king by the advice of his council to provide the remedy therein. And in theſe caſes the conſtitutions and orders of the council were of great authority, and next to the obligation of an act of parliament. But the inconvenience hereof was in proceſs of time found; for by colour thereof they often proceeded too far. And therefore in after times either the remedy was provided in the petition; or if things were thus generally recommended to the order of the council, or of the king and his council, they were for the moſt part ſuch as concerned the king's immediate intereſt, or ſuch wherein the king and his council could make reformation without authority of parliament.—2. Such ordinances and conſtitutions were made by the king and his council, or by the council with the king's conſent. And of ſuch we have ſeveral inſtances in ancient

ancient records; though many times they adventured too far upon their own power.

INSTANCES of ordinances made by the council are many. I ſhall mention but a few.

CLAUS. 23. *E.* 3. *par.* 1. *m.* 8. *dorſo*, an ordinance of the council touching labourers.

CLAUS. 24. *E.* 3. *par.* 1. *m.* 15. *dorſo*, an ordinance of the council touching the payment of the king's cuſtoms.

CLAUS. 25. *E.* 3. *par.* 1. *m.* 10. an ordinance of the council for the due regulation of the city of London, and againſt foreſtallers, &c.

CLAUS. 30. *E.* 3. *m.* 22. an ordinance of the council and proclamation thereupon touching prices of wines *ſub pœnâ forisfacturæ*, but ſuperſeded *clauſ.* 31. *E.* 3. *m.* 21. *Vid. clauſ.* 29. *E.* 3. *m.* 38. touching the ſame matter.

CLAUS. 38. *E.* 3. *m.* 12. an ordinance of the council touching the fiſhmongers, drapers, and vintners.

BUT, as I before ſaid, many times they exceeded their power both in the matter and the manner of their ordinances, which occaſioned complaints in parliament.

ROT. *parl.* 13. *R.* 2. *n.* 30. *Item prient les comons, que le chaunceller, ne le counſell le roy, apres le parlement finy facent nul ordinance encounter le comon ley ne les auncient cuſtomes de la terre ne les ſtatutes devant ces heures ou à ordeiner en meme ceſtui parlement, eins curge le comon ley a tout le*

le peuple univerſall, & que nul judgement rendus ſoit admett ſans due proceſſe de ley.

RESP.—*Soit uſe come ad eſtre uſe devant ces heures, iſſint que le regaly de roy ſoit ſauves; et ſi aſcun ſoit ſent greve, monſtre en ſpecial, et droit lui ſera fait.*

II. As to the juriſdiction of the council *in foro contentioſo*, it was exerciſed one of theſe three ways. (1.) Either in parliament time, when they ſat either with the lords or as aſſiſtants to them. (2.) Or when a ſpecial power was committed to them, ſometimes in particular petitions or cauſes, ſometimes upon many petitions together, *authoritate parliamenti.* (3.) Upon the ſingle account of their own authority merely as they were *conſilium regis.*

(1.) TOUCHING the firſt of theſe, it is true, that in ancient times, eſpecially in the times of *E.* 1. they did in parliament time ſometimes alone, ſometimes in conjunction with the lords houſe in caſes of great moment, exerciſe an ample juriſdiction. The book in the Tower, ſtyled *Placita Parliamenti*, now entirely printed by mr. Ryley, gives us many inſtances of it, too many indeed to be here repeated; and therefore thither I ſhall refer the reader.—But, 1. If they were caſes of ſmaller moment, they were by the indorſement of the petition referred to the ordinary courts with ſome ſuch indorſement as this, *ſequatur ad communem legem*, as is above ſhewn.—2. If they were caſes wherein remedy was to be had only by a new act of parliament and not otherwiſe, they were diſmiſſed, as well where the council alone, as the lords houſe together with the council or with their aſſiſtance, were conſulted, with this anſwer, *ley n'eſt uncore ordeyn en ceo caſe*, or *non eſt lex ordinata, il ne poet eſtre ſans nouvel ley ordone in ceo caſe a quel choſe faire le commonalty de la terre ne veult ny uncore aſſentu.* See for theſe and the like anſwers, Ryley, 652. the caſe of John de Kirbrooke,

brooke, who prayed remedy for waſte done by tenants in tail after poſſibility of iſſue extinct. *Ibidem* 409. the caſe of Martin Chamberlain, praying reſtitution of a manor given by his anceſtor to the templars, to be delivered to him as his eſtate upon the diſſolution of their order. *Ibidem* 619. *inter petitiones*, 18. *E.* 2. upon a general petition of owners of land in foreſts to improve their lands without being put to ſue a licence. And therefore, although it is generally ſaid, that the *conſilium regis*, or even the lords houſe in parliament, ought not to proceed in caſes where the party hath remedy at law, it follows not, that they have power to relieve in all caſes not remediable by law, for that were to give up the whole legiſlative power to the houſe of lords or *conſilium regis*; but it is only then to be intended, that, where the caſe is remediable by laws already in force, but ſome obſtacle falls in that impedes the proceeding at law, as an aid-pryer of the king or ſome great confederacy and combination by perſons in power, they may in ſome caſes remove that obſtacle or impediment, if it cannot otherwiſe be removed. But of this more hereafter.

(2.) As to the ſecond of theſe, namely of ſpecial power committed to them to determine matters by conſent of parliament, theſe were of two kinds. 1. When ſpecial acts of parliament were made giving the council power to hear and determine ſuch or ſuch cauſes or matters. And there were ſeveral ſuch acts of parliament even before the ſtatute of 3. *H.* 7. which erected the court of ſtar-chamber in that form as it is thereby ſettled. As for inſtance, a *præmunire* for ſuing in the court of Rome, &c. by the ſtatute of 27. *E.* 3. *cap.* 1. *de proviſors*; by the ſtatute of 12. *R.* 2. *cap.* 2. for *ſcandalum magnatum*; by the ſtatute of 13. *H.* 4. *cap.* 7. for great riots; 31. *H.* 6. *cap.* 2. for riots and oppreſſion; 1. *R.* 2. *cap.* 4. maintenance. 2. Again, there were many petitions referred to the council from the parliament, ſometimes by the anſwer of particular petitions; and ſometimes whole bundles of petitions in parliament, which by reaſon of the diſſolution of the parliament could not be there determined, were

referred in the cloſe of the parliament, ſometimes to the council in general, and ſometimes to the chancellor; and this I take to be the true original of the chancery's juriſdiction in matters of equity, and what gave the riſe of thoſe multitudes of equitable cauſes to be there arbitrarily determined.

AND there are infinite inſtances of this nature, as well of the petitions of the commons, as of private petitions referred *authoritate parliamenti*, ſometimes to the chancellor, ſometimes to the council with the advice of the judges; only with this difference, that the general references of the petitions of the commons, that were undetermined at the cloſe of the parliament, were ſo referred at the requeſt and by the conſent of the commons, or otherwiſe they were reſumed in the next parliament. *Vid. rot. parl.* 4. *H.* 6. *n.* 21. 6. *H.* 6. *n.* 45. 8. *H.* 6. *n.* 69*. And then the anſwers to theſe petitions were equivalent to a determination of both houſes of parliament.

BUT many times particular petitions, though promoted by the commons, or by the particular petitioners themſelves, were referred to the council, either by the king alone or by the king and lords, either to the chancellor or council without the requeſt of the commons; and yet fairly indorſed, *ſoit ce petition mande al councell a determiner* AUTHORITATE PARLIAMENTI, as if it had the conſent of both houſes. Touching which there was great complaint made by the commons *rot. parl.* 3. *H.* 5. mentioned *ſupra* CHAP. III. And although this indorſement thus made without the conſent of the commons gave a countenance to their deciſion; yet it was of no greater force, than a deciſion made by the council alone or by the upper houſe and council. *Vid. rot. parl.* 50. *E.* 3. *n.* 81. 140. 164. 141. 156. 160. 172. 182. *Rot. parl.* 9. *H.* 4. *n.* 31. 32. 37. 1. *H.* 4. *n.* 50. 3. *H.* 5. *p.* 1. *n.* 43. 44. 4. *H.* 5. *n.* 15. 15. *H.* 6. *n.* 33. 34†. And thus

* *Rot. parl.* 22. *E.* 3. *n.* 4.

† *Rot. parl.* 6. *H.* 6. *n.* 17. 8. *H.* 6. *n.* 21. & 69.

far

far touching the juriſdiction of the council by a kind of delegation by act or conſent of parliament.

(3.) I COME now to conſider the power of juriſdiction of the *conſilium regis* ſimply conſidered as ſuch.

THE time of exerciſe of their juriſdiction (which may make ſome difference) was either in time of parliament and upon complaints or petitions in parliament, which I ſhall conſider ſpecially hereafter, or elſe out of parliament and without relation thereunto, of which I ſhall ſay ſomewhat here.

THERE be ſome, that aſſert a primitive and original juriſdiction in the *conſilium regis* in all matters or controverſies as well civil as criminal. And they infer it,

1. FROM the oath they anciently took, *quod vide* 35. *E.* 1. *Ryley* 317. wherein there are theſe articles, 1. of advice or council; 2. of juriſdiction, viz. *que vous ne ferres per amour ne pur haour, per bone gree ne per maveis gree; que vous ne faces faire a cheſcun de quel eſtate ou condicion droyture et reaſon ſolone voſtre poiar et a voſtre eſcient; et que nulli riens prendrez pur tort faire ne droyture delayer; et que en judgement ou droiture faire la ou vous ſeres aſſignes nous neſpermres nulli pur hauteſs ou poverte ne pur richeſſe que droit ne ſoit fait.*

2. AGAIN, they infer it from the frequent exerciſe of juriſdiction almoſt in all kind of cauſes, whereof the *Placita Parliamenti E.* 1. are full. And there are many inſtances extant thereof almoſt in all ages till the very erection of the court of ſtar-chamber in 3. *H.* 7. which was but a kind of new modelling of this *conſilium regis*, and retained the name of *conſilium regis* in all the proceſs they made.

3. BECAUSE notwithſtanding the abridgment of their power in ſome caſes by the ſtatutes of 25. & 42. *E.* 3. whereof hereafter; yet

they had ſtill the countenance of acts and proceedings of parliament in other caſes (only cauſeleſs ſuits and ſuggeſtions were puniſhed with a greater ſeverity) as appears by the ſtatutes of 37. *E.* 3. *cap.* 18. 38. *E.* 3. *cap.* 9. 17. *R.* 2. *cap.* 6. the petitions and anſwers *rot. parl.* 1. *R.* 2. 2. *R.* 2. *part.* 2. *n.* 1. 50. *E.* 3. *n.* 80. in matter of repriſal; *ibid. n.* 140. 164. in caſe of riots; *ibid. n.* 241. in caſes of combinations to hinder trade; *ibid. n.* 160. merchants diſavowing their factors; *ibid. n.* 171. uſurpations by the cinque ports; *ibid.* 182. miſdemeanors of bailies, and infinite more matters of the like nature, not only proceeded in by the council, but as it were tacitly admitted even in parliament to belong to their cognizance. *Vid. Crompt. Juriſdict. Courts, pag.* 61. 62. 63.

On the other ſide it is contended, that the *conſilium regis* had only a power of advice and direction, not a power of deciſion or determination of cauſes either civil or criminal, but that what they did in this kind was illegal and incroachment upon the common law; that the ſtatutes of 25. *E.* 3. *cap.* . and 42. *E.* 3. were but affirmances of the common law, and the ſtatute of *Magna Charta.* And therefore in all ages there have been continual complaints of the commons, not only againſt the arbitrary proceedings of the chancery, but even of the *conſilium regis*, yea of the houſe of lords, for their proceſs by *ſubpœna*, by privy ſeal, by general proceſs *certis de cauſis*, and the like. *Vid. rot. parl.* 21. *E.* 3. *n.* 28. 25. *E.* 3. *n.* 16. 42. *E.* 3. *n.* 12. 45. *E.* 3. *n.* 41. 1. *R.* 2. *n.* 23. 2. *R.* 2. *part.* 2. *n.* 49. 13. *R.* 2. *n.* 33. 17. *R.* 2. *n.* 10. 1. *H.* 4. *n.* 160. 2. *H.* 4. *n.* 69. 4. *H.* 4. *n.* 78. 79. 3. *H.* 5. *part.* 1. *n.* 46. 9. *H.* 5. *part.* 2. *n.* 25. 1. *H.* 6. *n.* 41. 2. *H.* 6. *n.* 15. 10. *H.* 6. *n.* 35. 15. *H.* 5. *n.* 25. and the ſtatutes drawn up upon ſome of theſe petitions, viz. 5. *E.* 3. *cap.* 9. 25. *E.* 3. *cap.* 4. 28. *E.* 3. *cap.* 3. 42. *E.* 3. *cap.* 3. But not to ravel into this buſineſs too far, I ſhall only give an account of what occurs touching this buſineſs in order of time.

1. It

1. It is certain, that in ancient times the *conſilium regis*, as well out of parliament as in it, exerciſed a very great juriſdiction both in cauſes criminal and civil, as appears abundantly in the *Placita Parliamenti* of *E.* 1.

2. But this power and the exerciſe thereof were much abated, eſpecially in the time of *E.* 3. by act of parliament: as—5. *E.* 3. *cap.* 9. that no man be attached by any accuſation nor forejudged of his life or limb, nor his lands tenements goods or chattels ſeized into the king's hands, againſt the form of the great charter and the law of the land.—25. *E.* 3. *cap.* 4. that none ſhall be taken by petition or ſuggeſtion to the king or his council, unleſs it be by indictment or preſentment or by writ original at the common law, nor ſhall be put out of his franchiſe or freehold unleſs he be duly put to anſwer and forejudged of the ſame by due courſe of law.—28. *E.* 3. *cap.* 3.—By the ſtatute of 42. *E.* 3. *cap.* 3. which takes notice of perſons accuſed and taken and cauſed to come before the king's council by writ and otherwiſe againſt the law, it is aſſented, that no man be put to anſwer without preſentment before juſtices or matter of record, or by due proceſs and writ original according to the old law of the land. The parliament roll is ſomewhat fuller to this purpoſe, viz. *rot. parl.* 42. *E.* 3. *n.* 12.—The ſtatute of 4. *H.* 4. *cap.* 23. Whereas in pleas real and perſonal, after judgment given in the king's courts, the parties be made to come under grievous pain, ſometime before the king himſelf, ſometime before the king's council, and ſometimes to the parliament to anſwer thereof anew, to the great impoveriſhment of the parties and in ſubverſion of the common law of the land; it is ordained, that after judgment given in the king's courts the parties and their heirs ſhall be thereof in peace until the judgment be undone by attaint or by error, if there be error, as hath been uſed by the laws in the time of the king's progenitors.

Yet it ſeems for all this, the ſuggeſtions to the king or his council were continued, though not in the ſame meaſure as formerly; for

ſeveral

ſeveral ſtatutes were made to force them to give ſureties to prove their ſuggeſtions, and to puniſh them if they failed in proof; as 37. *E.* 3. *cap.* 18. 38. *E.* 3. *cap.* 9. 17. *R.* 2. *cap.* 6. 15. *H.* 6. *cap.* 4. which argue the uſe of theſe proceedings before the council were continued, though probably not ſo much as formerly.

3. But beſides theſe acts of parliament abridging the power of the council, there were other circumſtances and occurrences, that did gradually bring it into great diſuſe, though there remain ſome ſtraggling footſteps of their proceeding down till near 3. *H.* 7. viz. —1. The ſubſtitution of the *auditores petitionum* in parliament, which did moſt of their buſineſs touching petitions in parliament.—2. And alſo in parliament the lords of the upper houſe of parliament took much of their parliamentary buſineſs touching petitions in parliament out of their hands, and aſſumed it to themſelves, and only made uſe of the *conſilium regis* as aſſiſtants.—3. The many buſineſſes of ſtate and public affairs ſo took up the time of the council, that they could not attend the diſpatch of private petitions.—4. The attendance grew grievous, and the charge exceſſive, to the very ſuitors themſelves, as well as the defendants; for ſometimes they could not have a diſpatch after a long attendance, but it may be when all was done they were ſent to the ordinary courts, who made it their conſtant buſineſs to attend the cauſes that came before them; and therefore people choſe to begin their ſuits rather in the ordinary courts, where they might have convenient diſpatch.—5. When any matter of fact was in iſſue before the council, they did not as now try it by examination of witneſſes (which is a civil law proceeding, and brought in by thoſe chancellors and officers which for the moſt part were clergymen, and better liked the civil law trial than that of the common law) but either ſpecial commiſſions iſſued to try the iſſues of fact, which were remitted to them with the inquiſitions thereupon found; or which was moſt ordinary, and is in many caſes at this day uſed in chancery, the record itſelf was delivered either by the chancellor or by

by order of council to the king's bench to be tried, and then the whole proceeding both of judgment and execution was in the king's bench, and the record entered there, of which there are infinite inſtances in antient records, even in the *Placita Parliamenti. Vide Ryley, Placita Parliamenti, pag.* 41. 55. 65. 74. 117. 15. 16. 26. 34. 41. 48. 98. 180. 112. And this is one reaſon, why moſt of the proceedings in theſe *Placita Parliamenti* are not only entered here, but alſo in the king's bench, as that of the earls of Glouceſter and Hereford, that of the archbiſhop of York and biſhop of Durham, that of the prior of Tinmuth, that of William de Valentia, and many more; for they had for the moſt part their trial and final determination in the king's bench. And this was a great charge and trouble to ſuitors, and did by little and little wear out the exerciſe of juriſdiction by the *conſilium regis.*—6. Again, the continual complaints of the commons againſt the proceedings before the council in cauſes civil and criminal, although they did not always attain their conceſſion, yet brought a diſreputation upon the proceedings of the council, as contrary to *Magna Charta* and the known laws.—7. Yea the judges themſelves and the ſages of the law, though members of this *conſilium*, yet did not much countenance the proceedings in cauſes *coram conſilio*, eſpecially when ſo many acts and petitions in parliament were againſt it.

And therefore, although ſome antient records in the time of *E.* 1. and before tell us of reverſal of judgments by writs of error *coram conſilio regis*; yet very few of them, if any at all, were before the *conſilium regis*, but either in the lords houſe in parliament, or in the king's bench, in both which the *conſilium regis* were in nature only of aſſiſtants.

Placita *Parliamenti E.* 1. *Ryley* 57. The abbot of Weſtminſter complains of an erroneous judgment given againſt him in the king's bench. The complaint was *regi et conſilio.* The judgment was reverſed. But it is entered *inter placita parliamenti*; and, as I have ſhewn,

ſhewn, *conſilium* is often intended of the lords houſe aſſiſted with the *conſilium ordinarium.*

IBID. *pag.* 62. Peter Maulore complained *coram domino rege et ejus conſilio ad parliamentum* 18. *E.* 1. concerning an erroneous judgment given in the king's bench, which is in part affirmed. This was in the parliament *ut ſupra.*

PAG. 169. 167. Upon a complaint *regi et conſilio* by the biſhop of Durham of an erroneous judgment given againſt him by the juſtices itinerant in the county of Northumberland, *conſideratum eſt per ipſum regem et conſilium, quòd judicium revocetur et adnulletur et libertates reſtituantur.* This being in parliament time ſeems to be by the lords houſe in parliament.

IBIDEM 145. 150. A judgment given at Edinburgh *coram juſticiariis et auditoribus querelarum regni Scotiæ* is brought *coram rege et conſilio,* and errors are aſſigned and the judgment reverſed. This receives the ſame anſwer.

IBIDEM 175. An outlawry in felony before juſtices itinerant againſt Robert Scuteville is by writ of *certiorari* removed *coram nobis ubicunque ut inde faciamus quod de conſilio noſtro duxerimus ordinandum.* Errors are aſſigned; *et per ipſum dominum regem et conſilium ſuum concordatum eſt, quòd exigenda præfata revocetur et omnino adnulletur. Pag.* 183. It ſeems this was in the king's bench; for *coram nobis ubicunque, &c.* is the proper ſtile of that court, though the entry of the judgment and proceedings be *coram rege et conſilio.*

IBIDEM 192. 199. a judgment given in Ireland, before the chief juſtice there, in the preſence of divers of the council, between William Veſey and John Fitz-Thomas, was brought into the parliament of England 23. *E.* 1. and thence continued *uſque proximum parlianien-*

tum,

tum, and thence unto another parliament. *Ad idem parliamentum venerunt partes in propriis perſonis coram ipſo domino rege et ejus conſilio*; and upon errors aſſigned, *conſideratum eſt per ipſum regem et conſilium ſuum, quòd prædictus proceſſus totaliter adnulletur*. This appears to be a proceeding in parliament; for the ſtile is *placita et memoranda coram domino rege ad parliamentum*; the continuances are *ad parliamentum*; and though the judgment be entered *per regem et conſilium*, yet that muſt be intended in the lords houſe in parliament, to which the word *conſilium* is often applied, as appears in this record and thoſe before mentioned CHAP. II.

INDEED in *Hil.* 3. *E.* 1. *rot.* 8. *dorſ.* judgment in aſſiſe by Henry *de Novo Burgo* againſt William le Moyn was removed into the king's bench, and there judgment reverſed; and a complaint thereof to the king, that the reverſal was erroneous: thereupon a *ſcire facias* to the parties, *quòd ſint coram domino rege ubicunque, &c. ad faciendum et recipiendum*; where *videtur domino regi et ejus conſilio*, that the reverſal was erroneous, and judgment given for the plaintiff in the aſſiſe. The reverſal in the king's bench reverſed in the ſame court *per regem et conſilium*.

BUT whether any of theſe judgments in antient times were by the *conſilium regis* or not; yet certain it is, that in after-ages the conſtant opinion and practice was to diſallow any reverſals of judgments by the council, which appears by the notable caſe of 39. *E.* 3. 14. In an aſſiſe the defendant pleaded in bar entitling himſelf as ſon and heir of *J. S.* who died ſeiſed: the plaintiff claiming as daughter pleaded the defendant was a baſtard: the biſhop certifies, that the defendant is a baſtard becauſe begotten upon the wife of *J. S.* by *G.* during her elopement in adultery, and ſo a baſtard: the tenant fearing judgment might be given againſt him complained in parliament, that the biſhop certified contrary to the common law of England. And thereupon a writ iſſued under the great ſeal to the juſtices of aſſiſe to ſurceaſe proceedings. Yet they took the aſſiſe in right of

damages, and adjourned the parties into the common bench. Then there iſſued a writ to the common bench to remove the record into the council before the biſhops of Bath and Ely, to try, whether the ſpecial matter were ſufficient to baſtardize the iſſue, and they judged it a good certificate upon the matter. *Et puis pur ceo que les juſtices d'aſſiſe priſterent l'aſſiſe en droit de damages encontre le brief qui vient, le chauncellor reverſe le judgement devant le councell, ou il fut adjudge en meme le cours come l'eveſque uſt certify et mander arreremain le record en banck. Et la, pur ceo que l'eveſque uſt certify, que le tenant fuit pleinement baſtard, fuit agard, que le plaintiff recoveroit ſa ſeiſin et ſes damages. Mes les juſtices ne priſterent nul regard al reverſer devant le councell, pur ceo que ce ne fuit place ou jugement purroit eſtré reverſe.* And therefore although 50. *E.* 3. *B. R. rot.* 46. divers of the judges of the common bench *et alii proceres et magnates de conſilio* were preſent at the examination of infancy in a writ of error upon a fine; yet the judgment was given by the court of king's bench according to their ordinary and ſettled juriſdiction.

I HAVE given the caſe of 39. *E.* 3. at large, becauſe it fully ſettles the excluſion of any juriſdiction in the council as ſuch to reverſe judgments, and ſhews other points of learning, which will be of uſe in this argument hereafter.

BUT now by what hath been ſaid it appears, that the power of the *conſilium regis* was much abridged and abated. Yet it did not wholly ceaſe, but was exerciſed in many caſes not committed to them by acts or authority of parliament.

IT is true, their power in civil cauſes was but rarely exerciſed. But yet exerciſed it was under another title; namely by the chancery: and therefore we may obſerve, that in theſe frequent complaints againſt the encroachments upon the common law, the council and the chancery are commonly joined.

As

As to their exerciſe of power in criminal cauſes it appears, that it was not altogether diſuſed after the ſtatutes above mentioned, though more rarely practiſed than formerly. And this appears,

1. By the frequent proceſſes by ſubpœna and privy ſeal and ſometimes ſerjeants at arms iſſued to appear *coram rege et conſilio*. *Vide Regiſter* 124. 191. *Clauſ.* 20. *E.* 3. *pars* 1. *m.* 91. *dorſ. pars* 2. *m.* 11. *dorſ. Clauſ.* 21. *E.* 3. *part.* 2. *m.* 21. & 39. *dorſ.* 18. *E.* 3. *part.* 1. *m.* 22. *dorſ. Clauſ.* 20. *E.* 3. *part.* 1. *m.* 13.

2. By the frequent complaints in parliament againſt their proceedings, whereof before.

3. By inſtances of record and proceedings before them in criminal cauſes, ſome whereof are mentioned by my lord Coke in his juriſdiction of courts touching the ſtar chamber, page 61. to which may be added many more. *Clauſ.* 31. *E.* 3. *m.* 8. for the earl of Ormond; *clauſ.* 29. *E.* 3. *m.* 17. between the chancellor and mayor of Oxon; *clauſ.* 24. *E.* 3. *pars* 1. *m.* 11. *dorſ.* againſt the mayor of Newcaſtle for forgery; 43. *Aſſ.* 34. & 38.

And thus the caſe ſtood with the *conſilium regis*, till it received a new model and an acceſs of juriſdiction by the ſtatute of 3. *H.* 7. *cap.* 1.

But now by the ſtatute of 17. *Car.* 1. *cap.* 10. as well the court of ſtar chamber, as all juriſdiction of like nature and form, is taken away and aboliſhed. Yet I have been the longer in this diſquiſition touching the *conſilium regis*; becauſe it gives ſome light to antient records and proceedings, and is of uſe to be known in order to the better proſecution of what hereafter follows.

CHAP. VI.

CONCERNING THE *CONSILIUM REGIS*, AS IT STOOD IN RELATION TO OR CONJUNCTION WITH THE COURT OF CHANCERY.

ACCORDING to the method premiſed, I come now to conſider of the *conſilium regis* as it ſtood in relation to or conjunction with the other great courts or the king's principal officers of ſtate. And therein I begin with the court of chancery; and I ſhall conſider it in relation to the court of parliament in the laſt place, becauſe then I ſhall conſider of parliamentary proceedings.

THE court of chancery is a very great and antient court. No time can be aſſigned for its beginning; though as to ſeveral occaſions of ſome points of its juriſdiction, we may trace their original, or give probable gueſſes at it.

THE chancellor having the cuſtody of the great ſeal, the *conſilium regis* borrowed their proceſs for the moſt part from it; though ſometimes they iſſued proceſs under the privy ſeal, which was in the cuſtody of the clerk of the privy ſeal, and ſometimes under the ſeal of the exchequer when the matter concerned the revenue.

THE proceſs under the great ſeal was by *ſubpœna*, and ſometimes by *habeas corpus coram conſilio* or *coram conſilio in cancellariâ*; and theſe proceſſes were returnable for the moſt part in the chancery, yea, in caſes where the cauſe was depending ſingly *coram conſilio*. *Clauſ.* 20. *E.* 3. *pars* 1. *m.* 21. *dorſ.* *pars* 2. *m.* 11. *dorſ.*

AGAIN in ſome caſes, where yet the chancellor was the ordinary judge, yet many of the *conſilium regis* were co-aſſeſſors, and gave their advice,

advice, eſpecially the judges, according to which advice the chancellor gave judgment, as ſhall be ſhewn more particularly in this Chapter.

AND hence it came to paſs, that the proceedings in many caſes in chancery were ſtiled *coram conſilio domini regis in cancellariâ*, and ſometimes generally *coram conſilio*.

43. Ass. 35. a complaint of a proceſs DE RECTO *al chauncellor et councell noſtre ſeigneur le roy:* yet the ſuit was in chancery.

18. Ass. 18. Clifford's caſe. Proceſs returnable in chancery to reſeize lands for the king, *par aviſe le councell le roy, court agard, que les tenements ſoient ſeiſe en maines le roy.*

43. Ass. 15. in the caſe of the Duchy of Cornwall, upon an inquiſition found intitling the king to a wardſhip, *par agard de tout le councell le gard fuit ſeiſe en maines le roy:* yet the pleading was in chancery upon an inquiſition there returned. Regiſter fol. 267. a. *Idiota examinando coram conſilio:* yet it is done in chancery *aſſidente conſilio.*

AND infinite records might be added to ſhew, that many pleas in chancery are ſtiled *coram conſilio in cancellariâ* and *coram conſilio*, who are ſometimes named; ſometimes the treaſurer, juſtices of both benches, barons of the exchequer; ſometimes only the juſtices; ſometimes *per totum conſilium.* Take theſe inſtead of many more. *Clauſ.* 29. *E.* 3. *m.* 2. & 4. *Clauſ.* 26. *E.* 3. *m.* 20. *dorſ. Clauſ.* 20. *E.* 3. *part.* 2. *m.* 11. *dorſ. Clauſ.* 19. *E.* 3. *part.* 1. *m.* 8. *dorſ. Clauſ.* 30. *E.* 3. *m.* 2. *dorſ. Clauſ.* 43. *E.* 3. *m.* 7. *Clauſ.* 26. *E.* 3. *m.* 20. *dorſ.* For all which, and many more that might be cited, the ſuit was in chancery, and yet ſtiled *coram conſilio*; becauſe divers of the *conſilium ordinarium* were there preſent, and gave their advice, yea and

and ſometimes the judgment given as well by the *conſilium regis* as by the chancellor, though that form of entry was afterwards altered, as ſhall be ſhewed.

AND hence it is, that in many petitions in parliament mentioned in the former Chapter, and in the ſtat. of 31. *H.* 6. *cap.* 2. and ſome others, the chancery and council are uſed promiſcuouſly to expreſs the ſame thing; for it was but *conſilium regis in cancellariâ.*

BUT to deſcend to particulars.—The juriſdiction of the court of chancery is of two kinds. I. The equitable or Engliſh juriſdiction. II. The legal or Latin juriſdiction.

I. TOUCHING the equitable juriſdiction, though in ancient time no ſuch thing was known; yet it hath now ſo long obtained, and is ſo fitted to the diſpoſal of lands and goods, that it muſt not be ſhaken, though in many things fit to be bounded and reformed.

Two things might poſſibly give its original, or at leaſt much contribute to its enlargement.—1. The uſual committing of particular petitions in parliament not there determined unto the determination of the chancellor, which was as frequent as to the council; and when ſuch a foundation was laid for a juriſdiction, it is not difficult for it to acquire more.—2. By the invention of uſes, which were frequent and neceſſary, eſpecially in the times of the diſſention touching the crown.

IN theſe proceedings the chancellor took himſelf to be the only diſpenſer of the king's conſcience; and poſſibly the council were not called either as aſſiſtants or judges. Yet *vid.* 27. *H.* 8. 14. the ſecretary ſat with the chancellor. Poſſibly it was by way of advice, as ſometimes the judges are called to the chancellor's aſſiſtance.

II.

II. TOUCHING the legal or Latin ſide, the proceeding is of ſeveral kinds.

1. THEY proceed againſt officers of the court of chancery by bill or for them by writ of privilege until the parties deſcend to iſſue; and then it is ſent into the king's bench to be tried, and there alſo judgment is given without remanding it to the chancery.

2. THEY proceed alſo in *ſcire facias* upon recognizances taken in that court; and if the parties be at iſſue, it is ſent as above into the king's bench to be tried, and there judgment is given.

IN neither of theſe caſes the *conſilium regis* is concerned; but the chancellor proceeds as an ordinary judge; yea and in ſome reſpect in ſubordination to the king's bench; for if judgment be given in theſe caſes in the chancery (as it muſt where it is by default or confeſſion) a writ of error lies thereupon in the king's bench. 14. *Eliz. Dy.* 315. And ſo in a proceſs upon a ſtatute merchant certified into chancery, 17. *Aſſ.* 20. though ſome books ſeem to admit it an election to bring error in parliament. 37. *H.* 6. 13. 11. *E.* 4. 8.

THEY proceed in ſome caſes by virtue of acts of parliament giving the chancellor power to hear and determine the ſame; ſometimes alone; ſometimes others of the council joined with him, as in the caſe of differences ariſing in the ſtaple, *ſtatutum ſtapulæ* 27. *E.* 3. *cap.* 24. ſometimes with the advice of one of the judges, as in caſes of robbery at ſea by the ſtat. of 31. *H.* 6. *c.* 5. *Vid.* 2. *R.* 3. 2.

3. THEY proceeded anciently in moſt caſes of moment, that concerned more immediately the king's intereſt; as for inſtance, the determination of the king's right to wards (before the erection of the court of wards) and partitions thereupon made, or dower claimed of

of the ward's lands in the chancery, petitions of right, *monſtrans* of right, traverſes of right, *rege inconſulto*, and aid-pryers of the king; in which caſes they pleaded in chancery and ſhewed their titles, and in ſome caſes *procedendo* granted, in ſome caſes finally there determined; and if iſſue were joined therein, then the record ſent into the king's bench and there tried, and finally determined. *Vid.* 38. *E.* 3. 14. So in *ſcire facias* to repeal letters patent.

AND in theſe caſes the titling or ſtile of the record in chancery was ſometimes *placita in cancellariâ*, ſometimes *placita coram rege in cancellariâ*, ſometimes *coram conſilio in cancellariâ*. *Clauſ.* 24. *E.* 3. *m.* 11. *dorſ.*

AND anciently divers of the *conſilium regis ordinarium*, but eſpecially the judges and barons of the exchequer, were co-aſſeſſors with the chancellor.

AND ſometimes the entry of the judgment in the chancery in theſe caſes is as given by the chancellor and council as by one joint judicature. As *clauſ.* 19. *E.* 3. *part.* 2. *m.* 11. *dorſo*, in the caſe of Clifford, which is the ſame caſe reported 19. *Aſſ. placito ultimo. Et ſuper hoc habitâ per cancellarium theſaurarium juſticiarios et Willielmo de Shareſhul capitali barono de ſcaccario deliberatione, &c. de communi aſſenſu eorundem cancellarii theſaurarii juſticiariorum baronis et aliorum de conſilio dicti domini regis conſideratum eſt, &c. Clauſ.* 26. *E.* 3. *m.* 27. *dorſ.* in the caſe of Clee, the parties *venerunt in cancellariâ coram conſilio domini regis, præſentibus Simone archiepiſcopo Cantuariæ cancellario, Willielmo Ciceſtrenſi epiſcopo, Willielmo Shareſhul capitali juſticiario, et aliis de conſilio dicti domini regis, &c. Et habitâ ſuper hoc per dictum conſilium deliberatione diligenti, &c. videtur eidem conſilio, quòd hæc curia non habet cognoſcere, &c. Ideo conſideratum eſt, quòd eat ſine die.* So that it ſeems a common judgment given by all, and not barely by the chancellor authoritatively.

ritatively. The like we may find *clauſ.* 19. *E.* 3. *part.* 1. *m.* 17. *dorſ. Clauſ.* 28. *E.* 3. *m.* 2. & 4. *Clauſ.* 33. *E.* 3. *m.* 2. *dorſo*, and in diverſe other records.

But it is true in ſome records, though the judgment be given *de aviſamento et aſſenſu conſilii*, it is authoritatively given by the chancellor or court of chancery. And although at this day in caſes of this nature he doth and indeed ought to call the judges to his aſſiſtance, and to give judgment according to the advice of the greater part; yet the form of the entry or authoritative part of the judgment is by the chancellor or court of chancery. *Vid. Nov. Entrys* 404. & 483. *Et ſuper hoc habitâ maturâ et diligente deliberatione, de adviſamento juſticiariorum de utroque banco et aliorum peritorum de conſilio domini regis in eâdem curiâ cancellariæ exiſtentium, conſideratum et decretum eſt per Willelmum archiepiſcopum Cantuariæ cancellarium Angliæ et curiam cancellariæ prædictam, quòd manus domini regis amoveantur.* 19. *H.* 7. So that though the judges gave advice, yet the authoritative judgment was given by the chancellor and court of chancery.

It is true, that in ancient time, judgment given in chancery, in caſes of this nature, as well as in thoſe others abovementioned, were reverſible in the court of king's bench. At leaſt the party had election to bring his writ of error there or in parliament. *Vid.* 39. *Aſſ.* 18. 42. *Aſſ.* 22. upon a partition made in chancery. But I do know, that in caſe of a judgment given in the chancery upon a *rege inconſulto* upon an aid-pryer, in the caſe of Squibb for a teller's office in the exchequer, the then lord keeper would not grant a writ of error in the king's bench, but only in the parliament. And the only reaſon that can maintain this deciſion, and give a difference between this and a judgment in a *ſcire facias* or ſuit by privilege, muſt be this; becauſe this is one of the caſes, which is before the keeper or chancellor and the *conſilium regis*, whereunto

the judges are or ſhould be called, and give at leaſt their advice: and ſo it is one of thoſe caſes abovementioned, which are of a higher nature than ordinary caſes: and it is no reaſon, the judges, who are preſumed at leaſt to give advice in theſe caſes, ſhould be the judges of the errors of that judgment, wherein, by the conſtitution of the courts themſelves, they are to be public aſſiſtants and adviſers.

AND thus much ſhall ſuffice to ſhew, how the *conſilium regis* mingled with the chancery, and derived even the very name of *conſilium regis* to it, though with the addition for the moſt part of *conſilium regis in cancellariâ.*

CHAP.

CHAP. VII.

CONCERNING THE *CONSILIUM REGIS*, AS IT STOOD IN RELATION TO AND CONJUNCTION WITH THE KING'S BENCH.

THE *conſilium regis* in ancient times did ſo often ſit in the court of king's bench, and were ſo often mingled in and with that court and the tranſactions thereof, that the ſtile of that court many times was *placita coram conſilio regis*, and ſometimes *coram rege et conſilio*. For inſtance, *T.* 37. *H.* 3. *M.* 1. *E.* 1. & *H.* 1. *E.* 1. *placita coram rege et conſilio, placita coram conſilio, placita coram rege et reginâ et conſilio*; *H.* 1. *E.* 1. *rot.* 1. *placita coram rege et conſilio*; *P.* 1. *E.* 1. *in ſchedulâ coram conſilio*; and the continuances *coram rege vel ejus conſilio*, in an appeal of robbery. *H.* 2. *E.* 1. *rot.* 17. *Heref.* in an aſſiſe between Penbrigg and Mortimer the entry is, *poſtea coram M. de Litteſburg magiſtro Ricardo de Stanes et Nicholao de Stapleton juſticiariis ad placita domini regis terminanda aſſignatis, Waltero de Milto tunc cancellario, Roberto de Burnell, et aliis de conſilio domini regis.* Note the judges named in the firſt place. *H.* 3. *E.* 1. *rot.* 8. in an aſſiſe by Montford the record removed *coram domino rege* (which appears to be the king's bench), *et videtur domino regi et ejus conſilio, quòd minus ritè proceſſerunt ad captionem aſſiſæ*, and the judgment for the defendant by the juſtices of aſſiſe there reverſed and judgment for the plaintiff. *P.* 4. *E.* 1. the ſtile of the court is *placita coram domino rege*; and yet, *ibidem rot.* 28. *Heref.* in the caſe between Bohun and William de Valentia touching the profits of the court of Penbeach, the proceeding is *coram conſilio domini regis.—Vid. M.* 9. & 10. *E.* 1. *coram rege rot.* 24. a judgment given juſtices itinerant in dower. The reverſal is in the king's bench. Yet the entry of the judgment is, *viſum eſt domino regi et ejus conſilio manifeſtè eſt erratum.*

And when after about 10. *E.* 1. the ſtile of the king's bench ran generally *placita coram domino rege* and not *coram conſilio*; yet there were ordinarily ſome caſes, wherein there was a communication between the *conſilium regis* and the king's bench.—1. By way of advice and direction*. When difficult caſes occurred in the king's bench, they oftentimes reſorted to the council for their advice, as 19. *E. judgment* 174. touching the judgment for loſs of the hand in caſe of ſtriking in preſence of the court. And ſo 39. *Aſſ.* 19. touching ſetting a fine in diverſe other inſtances.—2. In caſes of iſſues joined before the *conſilium ordinarium* either in chancery or out of chancery, the record was commonly ſent, ſometimes by writ, ſometimes by delivery by the chancellor *propriis manibus*, into the king's bench. And then the whole record is entered in the king's bench, and judgment moſt commonly there given.—3. In caſes of great moment and example many times the *conſilium regis* ſat with the judges of the king's bench and gave their advice. *M.* 33. 34. *E.* 1. *rot.* 50. when the king of Scots did his homage to the king of England. *H.* 32. *E.* 1. *rot.* 19. *coram rege inter regem et priorem Wigorniæ* judgment given for the king, *coram toto conſilio, tam theſaurario et baronibus de ſcaccario, quàm cancellario et clericis cancellariæ, et etiam juſticiariis de utroque banco.* The like *P.* 35. *E.* 1. *rot.* 45. *Northampton. coram toto conſilio. T.* 24. *E.* 3. *rot.* 32. Otto de Holland *ductus ad barram pro eſcapio comitis de Ew conſtabularii Franciæ coram domino rege, aſſidentibus cancellario, theſaurario, comitibus Arundel et Hunt. Bartho. de Burgherſh, Nicholao de Northburgh clerico de privato ſigillo, juſticiariis de banco*, where Otto was committed to the marſhall.

But though the *conſilium* ſometimes ſat with them; yet the actual juriſdiction was in the court, and the ſitting of the council

* *T.* 43. *E.* 3. *rot.* 72. a forged fine taken off the file *per adviſamentum totius conſilii domini regis, tam magnatum quàm aliorum.* It ſeems it was the lords houſe in parliament.

with

with them was either for the greater ſolemnity or at moſt but by way of advice, and the court in after-times grew more curious therefore in their entries, that the authoritative judgment might appear to be in the court and not in the aſſeſſors (as was likewiſe done by the chancellor, as is before ſhewn).

AND therefore *P.* 50. *E.* 3. *rot.* 46. *Devon.* in a writ of error by John Pomroy and his wife to reverſe a fine for the non-age of the wife the record runs, *quâ inſpectâ coram juſticiariis et juſticiariis de banco et aliis proceribus et magnatibus de conſilio domini regis ex hâc cauſâ ibidem exiſtentibus, et diligenter examinatâ, videtur eis, quòd dicta Johanna modò non eſt infra ætatem, nec ad dictam quindenam Paſchæ præteritam fuit infra ætatem, per quod ipſa ad ſectam prædictam in formâ prædictâ faciendam non eſt admittenda: ideo Johannes Cary eat ſine die.* It ſhould ſeem this examination was in parliament; for it appears the record was ſent into the king's bench by writ dated 10 May 50. *E.* 3. And yet it is obſervable, that the juſtices of the king's bench are named even before the *proceres* and *magnates*; becauſe in truth it was moſt properly within their juriſdiction. The like method is *H.* 2. *E.* 1. *rot.* 17. *Heref.*

AND it is obſervable, that moſt of the great caſes, which are recorded *inter placita parliamenti E.* 1. which were in their nature cognizable by the king's bench, are likewiſe entered *inter placita coram rege*, as if tranſacted and judged in that court, eſpecially where they were criminal cauſes. For inſtance,

THE great caſe of the prior of Tinmuth, which was in the nature of a *quo warranto*, is entered *inter placita parliamenti E.* 1. But it is alſo entered and the judgment given as in the king's bench, *H.* 20. *E.* 1. *rot.* 59. *Northumbr. Placita Parliament.* Ryley 25.

THE

THE caſe touching the liberty of the county of Pembroke, *M.* 23. 24. *E.* 1.

THE proceeding againſt the archbiſhop of York for excommunicating the biſhop of Durham, *H.* 21. *E.* 1. entered *inter Placita Parliament.* Ryley 135.

THE great caſe between the earls of Glouceſter and Hereford, *Hill.* 20. *E.* 1. & *M.* 19. 20. *E.* 1. yet entered *lib. parl.* Ryley 74.

THE caſe of Nicholas Segrave in *lib. parl.* Ryley 266. is entered in the king's bench *P.* 33. *E.* 1. *rot.* 22. *Northampt.*

MANY more of this nature appear; and the reaſons thereof were theſe.—1. Sometimes the records themſelves were delivered out by the king's command to the juſtices of the king's bench, an inſtance whereof is in the parl. of 20. *E.* 1. Ryley 102.—Again, 2. in all or moſt caſes, where an iſſue was joined upon a complaint to the *conſilium regis* either in parliament or out of parliament, the iſſue was tried by commiſſion and returned to the council, but moſt commonly by the court of king's bench either at bar or by *niſi prius*, and then it was neceſſary the record ſhould be entered there.—3. I have ſometimes thought, that it was for the better and more authentic proceeding; for the court of king's bench having a fixed juriſdiction in moſt of the caſes thus entered before them, eſpecially in criminal, and they being always preſent with the reſt of the *conſilium regis*, where theſe matters were handled and judged, it was in effect the judgment of the king's bench itſelf in theſe ancient times; which was no ſmall ſecurity and advantage to the proceedings, the record thereof being made and entered in the court of king's bench, who had unqueſtionable juriſdiction in the caſe, which poſſibly might not be ſo clear as to the bare authority of the *conſilium regis.*

CHAP.

CHAP. VIII.

CONCERNING THE RELATION AND CONJUNCTION OF THE *CONSILIUM REGIS* TO THE COURT OF EXCHEQUER, COMMON PLEAS, AND PRIVY SEAL.

AS to the court of exchequer, there were and are great officers belonging to it, who were alſo moſt commonly members of the *conſilium ordinarium*, namely, the treaſurer the chancellor and under treaſurer of the exchequer, the barons and the chamberlains of the exchequer, and had a ſpecial ſeal, namely *ſigillum ſcaccarii*, in the cuſtody of the chancellor of the exchequer.

AND upon theſe accounts, and becauſe the buſineſs of the king's revenue was a large buſineſs, thoſe great officers did ſometimes call other of the *conſilium ordinarium* unto their aſſiſtance touching matters of the revenue. And oftentimes petitions to the council either in or out of parliament concerning the king's revenue were referred to them.

AND upon theſe accounts many times perſons were called by writ under the exchequer ſeal to appear *coram theſaurario et conſilio* upon ſuggeſtions, which writs were general *certis de cauſis*.

AND this appears by the complaints in parliament made againſt theſe proceedings in the exchequer by ſuggeſtion and proceſs *certis de cauſis*. *Rot. parl.* 47. *E.* 3. *n.* 34. 3. *H.* 5. *part.* 2. *n.* 46.

AND yet it ſeems they ſtill held the ſame courſe of proceeding, as appears by the caſe of Cheſterfield 39. *E.* 3. and the caſe of Ford 17. *H.* 6. cited by my lord Coke in his juriſdiction of courts under

under the title of the ſtar chamber. *V.* 33. *E.* 1. Ryley 372. *Adeat theſaurarium, qui convocatis ſibi juſticiariis et conſilio ipſius domini regis ſibi celerem faciat juſtitiam.* And poſſibly the caſe of 43. *Aſſ.* 38. might be a proceeding in the exchequer *coram conſilio.*

THE place of the convening of the council was in the exchequer chamber, where they heard cauſes criminal as well as civil by bill in Engliſh or French if they concerned the revenue.

THE criminal juriſdiction is taken away to all intents by 17. *Car.* 1. *cap.* . But their power in civil ſuits concerning the revenue or the king's fee-farm debtor or accomptant continues, and ſo hath long done. *Vide ſtatute* 33. *H.* 8. *cap.* . And the ordinary judges therein are the treaſurer chancellor and barons of the exchequer, to whom the reſt of the council were in nature of aſſiſtants when called, as they were to the chancellor in caſes there.

TOUCHING the common pleas, I do not at all find them as ſitting in that court called *conſilium regis*, though they were members of the *conſilium ordinarium.* For they were not concerned but only in civil ſuits, and that for the moſt part between party and party. Only in caſes of aid-pryer of the king the parties were ſent *ad ſequendum dominum regem* or *ejus conſilium in cancellariâ.* And many times they adviſed with the *conſilium ordinarium* in caſes of difficulty depending before them. And ſome inſtances may be given in great and eminent caſes depending before them, that ſome of the *conſilium* ſat by them in point of advice but not of juriſdiction.

TOUCHING the keeper of the privy ſeal, which was antiently *clericus de privato ſigillo*, he was a member of the *conſilium ordinarium*, and ſo

ſo continues, though with a higher title and precedence; and having the cuſtody of the privy ſeal, which the council made often uſe of as well in proceſs as otherwiſe, by the advantage thereof and by colour of ſome references made often to him by the council, and in conjunction with the maſter of requeſt, he gained of late a kind of court of equity, and iſſued proceſs of privy ſeal to parties upon petitions, or bills now formally preferred, though antiently only referred to him by the *conſilium regis* or by the king. This court he held for a while, but being under a diſcountenance it hath now for many years lain aſleep. This court *de facto* was no other but a branch of the council, wherein the lord privy ſeal being advanced to a higher ſtile than formerly preſided.

CHAP. IX.

CONCERNING THE HABITUDE AND RELATION OF THE *CONSILIUM REGIS* TO THE LORDS HOUSE IN PARLIAMENT, AND THEIR CONJUNCTION THEREWITH.

I HAVE hitherto conſidered the *conſilium regis ordinarium*, what it was, of what perſons and officers it ordinarily conſiſted, how it ſtood in its own ſimple conſtitution, and what its power and buſineſs and juriſdiction was. And I alſo have conſidered it in its relation unto and conjunction with other ordinary courts of juſtice.

AND now I draw nearer to what was my principal deſign, namely, the conſideration of the lords houſe in parliament, and as neceſſarily previous thereunto the conſideration of the *conſilium regis ordinarium* in relation to and conjunction with that houſe.

AND to ſay the truth, although much of the antient power, juriſdiction, and conſiſtency of the *conſilium regis*, is altered by proceſs of time and ſeveral acts of parliament, as is above mentioned CHAP. V. yet, in the great court of parliament, at leaſt the figure and model of the *conſilium regis* and the perſons whereof it conſiſted is to this day preſerved in the lords houſe in parliament. For thither are ſummoned the great officers, whether they are peers or not; as the chancellor, treaſurer, privy ſeal, ſecretaries of ſtate, judges, barons of the exchequer, maſters of chancery, king's ſerjeant and attorney, the treaſurer of the houſehold, ſteward and chamberlain of the houſehold, and moſt if not all the king's privy council. And although they are ſummoned by writ, and ſit in the lords houſe; yet their diſtinction from the lords ſpiritual and temporal appears, 1. In the manner of their ſummons, thoſe having this clauſe in their writ,

ad

ad tractandum nobiſcum et cum cæteris prælatis proceribus et magnatibus; and thoſe of the council, *ad tractandum nobiſcum et cum cæteris de conſilio noſtro*, as before is ſhewn. 2. In the ſeats of their ſitting; the peers and biſhops ſitting on benches, thoſe of the *conſilium* if not peers ſitting on the woolpacks in the middle of the houſe. 3. In the extent of their ſuffrages; thoſe that are peers or lords of parliament having voices in the legiſlative power, but thoſe of the *conſilium ordinarium* having no voices therein.

And yet we are not without an inſtance of their proteſtation entered againſt bills that were highly derogatory to the common law, and againſt the judgment and opinion of the chancellor and judges. *Rot. parl.* 15. *E.* 3. *n.* 42.

But as to their ſuffrages in point of judicature in the lords houſe, it ſhould ſeem by the many inſtances *inter placita parliamenti tempore E.* 1. ſome whereof are before mentioned, they had their voices and ſuffrages therein. But about the time of *E.* 3. they began to be but in nature of aſſiſtants or adviſers, and the authoritative and judiciary power reſted in the lords houſe, which what it was we ſhall hereafter ſee.

Yet in matters of law their opinion (of the judges eſpecially) when they became but in nature of aſſiſtants, was in matters of law and judicial proceedings of ſo great weight and authority, that the advice by them given was the rule of the judgment of the lords houſe, from which they very rarely if at all departed. This appears by infinite inſtances. See for that purpoſe the ſtatute of 14. *E.* 3. *cap.* 5. in the conſtitution of the commiſſion for remedy of delays of juſtice; *rot. parl.* 14. *E.* 3. *n.* 30. on Stanton's caſe, where the judgment, not only of the lords houſe, but of both houſes of parliament, was guided by the judgment of the chancellor, treaſurer, the major voice of the juſtices and barons of the exchequer, *et autres de councell de roy en le*

dit parlement. The like *rot. parl.* 9. *H.* 5. *n.* 12. concerning a prohibition in the caſe of Cooke, parſon of Somerſham: the judges and barons gave their opinions in parliament, that no prohibition lay; whereupon the *cuſtos Angliæ* and lords awarded *ſelonc l'adviſe de les juſtices et barons, que nul prohibition giſoit ſur le matter.* And infinite inſtances of this kind might be found in antient records.

YEA and in later times alſo. 1. *H.* 7. 19. In caſe of a writ of error in parliament, the lords *per conſilium juſticiariorum* proceed *ad errorem corrigendum.* And therefore in the caſe of the earl of Oxon and Lyndſey touching the office of great chamberlain, now reported by juſtice Jones pag. 130. the lords gave their judgment conformable to the reſolution of the greater number of the judges. And in the beginning of the parliament 1640, in the caſe for the barony of Gray de Ruthen between Langreiſh and the earl of Kent, where the queſtion was, whether the rule of *poſſeſſio fratris de feodo ſimplici facit ſororem hæredem* extended to a barony by writ, it was reſolved by the opinion of the judges delivered in the lords houſe, that it did not. Though theſe were caſes only of advice and concerning matters of honour; yet the lords gave their judgment conformable to the opinion of the judges.

Now it is to be noted, that, although the *conſilium regis* ſat in parliament, yet we muſt remember, that they were ſtill under a double capacity, viz.

ONE, as they were *conſilium regis ordinarium.* In which reſpect, as they had petitions depending before them before the parliament; ſo they had in the time of parliament other petitions delivered to them or to the king, and delivered over or referred to them, which did not concern the parliament at all. And upon theſe they proceeded to give anſwers according to the nature of them as at other times out of parliament, and they were received as formerly by the clerk of the council. Touching theſe, and what they might or might not do in them, is at large declared *ſupra* CHAP. IV.

THEY

THEY had another capacity or conſideration, as being part of the king's great council in parliament, or at leaſt as great and neceſſary aſſiſtants thereunto. And though till about the middle of *R.* 2. all petitions, as well in parliament as out of parliament, were directed either to the king or the king and his council or to the king's council; yet the parliamentary petitions had a diſtinction from thoſe that ordinarily concerned the council as ſuch. 1. Moſt of the parliamentary petitions had ſomething in the ſtile or body or prayer of the petition, which made it appear, that they were ſuch; as for inſtance, *au roy et a ſon councell en parlement*; or it prays that a record may be brought into the parliament, or that relief may be given *par roy et ſon tres ſage councell en parlement.* 2. The petitions in parliament had always a time prefixed for their delivery, viz. four or ſix days in the beginning of the parliament. 3. For the moſt part theſe parliamentary petitions were delivered to certain examiners appointed by the king the firſt day of the parliament, as ſhall be ſhewn more at large in the next Chapter. But thoſe that were not parliamentary petitions were received of courſe by the clerk of the council. *Sed de his plus infrà.*

CHAP.

CHAP. X.

CONCERNING THE VARIOUS NATURES OF PETITIONS, AND HOW ENTERED.

THE parliamentary petitions were of two kinds. I. Such as came up from the houſe of commons, as being aſſented unto by them and ſent to the lords. II. Such as were petitions of private perſons.

I. TOUCHING the former of theſe I ſhall ſay ſomewhat, but not much, becauſe it is not the thing I principally intend. Of latter times, eſpecially towards the latter end of *H.* 6. and ſo downwards, acts of parliament were drawn up in their full form, and ſo ſent to the other houſe or to the king, ſometimes in this form (when it came from the commons), *Item quædam petitio liberata fuit, &c. formam actûs in ſe continens, viz.* and this avoided many great uncertainties and inconveniencies, which the courſe anciently uſed had occaſioned.

BUT in the elder times down ſo low as *H.* 6. the petitions of the commons did not contain the formality of acts; but after the concluſion of the parliament the judges principally were employed, out of the petition and the king's anſwer, to draw out a formal act, which was ſent by proclamation into all counties; and the acts, which were thus drawn up and proclaimed, were entered upon another roll, viz. the ſtatute roll. *Rot. parl.* 2. *H.* 4. *n.* 21. *Item les commons prierent a noſtre ſeigneur le roy, que les beſoignes faits ou a faire en ceſt parlement ſoient enacts et ingroſſes devant le departer des juſtices, tant come ils aient en lour memory a quoi leur fuit reſpondus, que le clerke de parlement ferra ſon devoyer pur enacter et engroſſer le ſubſtance du parlement*

lement par adviſe des juſtices, et puis le monſtrer al roy et as ſeigneurs du parlement pur ſavoyr leur adviſe.

AND this made up the ſtatute roll in theſe elder times.

THE petitions delivered by the commons were of two ſorts. Some were public; ſome were private petitions, preſented firſt to them, and by them preferred to the lords, which yet were reckoned amongſt the *petitiones communitatis*. And it ſeems, that theſe were immediately indorſed as bills now are, *ſoit bayl au ſeigneurs*; and if aſſented unto by the lords and king without any alteration, they did not uſe to indorſe the bill as now, *ſoit bayl au roy*, but it was delivered to the clerk of the parliament to be enrolled; and if it began with the lords, it was not indorſed as now, *ſoit bayl al commons*, but ſent down without indorſement. And the commons indorſement is, *les commons ſont aſſentus*. 33. *H.* 6. 17. 18. *per Kerby*. And when anſwered and aſſented to by the king they then were filed, and were the warrant for the drawing it up into an act; though in truth no ſuch indorſement now appears, becauſe the petitions themſelves are not extant.

AND as far as I can conjecture, all thoſe *petitiones communitatis*, whether private or public, were delivered immediately to the lords, as bills now are; and ſuch of them, as were agreed to by the houſe of lords, though it may be rejected by the king, were entered upon the parliament roll. For it is evident, that the parliament roll was made up in the lords houſe, moſt commonly by the clerk of the parliament, but ſometimes by the clerk of the crown; and although no expreſs aſſent to thoſe petitions is entered to be made by the lords, yet it is not to be thought, that it would be entered in the parliament roll in the lords houſe, unleſs aſſented to by them.—And thus far of the *petitiones communitatis*.

FOR

II. For private petitions in parliament preſented only by private perſons, they were of two ſorts, and accordingly were under two kinds of rolls or memorials.

Some were immediately preſented to the lords either by the parties themſelves, or elſe ſent thither by the council or *auditores petitionum*. Both theſe, if received and admitted by the houſe, were likewiſe entered on the parliament roll.

Some again were delivered over by the receivers of petitions, either to the *conſilium regis* or the *auditores petitionum*, and by them indorſed. And theſe petitions are not entered on the parliament roll, but were entered *in bundellis petitionum parliamenti* with their anſwers. Some of each bundle are preſerved to this day, but diverſe of them loſt or miſlaid.

So that beſides the journals of parliament we have three notable memorials of parliamentary tranſactions.

1. The bundles of petitions with their anſwers; which by the hands of the receivers of petitions were delivered, ſometimes to the council, ſometimes to the auditors of the petitions, and by the council or auditors of the petitions anſwered without troubling the lords with them.

2. The parliament rolls, conſiſting amongſt other things of the petitions of the commonalty whether public or private, and aſſented to by the lords; and of thoſe petitions, which were immediately admitted by the lords from the petitioners themſelves; or of ſuch private petitions as were turned over to the houſe by the *auditores petitionum* or council.

3. The

3. THE ſtatute roll made up and collected out of the petitions preſented by the commons aſſented to by the lords, and therefore entered upon the parliament roll, and likewiſe aſſented to by the king.

THIS is my conjecture touching the records of parliamentary petitions, and their entry upon the parliament roll or bundle of petitions; which though it ſeems probable, yet is but a conjecture, for the records are dark and obſcure touching it.

CHAP. XI.

TOUCHING THE TRANSMISSION OR DELIVERY OF PARLIAMENTARY PETITIONS TO AND FROM THE *CONSILIUM REGIS*.

ANTIENTLY, as I have formerly ſaid, all petitions, as well parliamentary as others, were directed to the king, or to the king's council, or to the king and his council; which titling of private parliamentary petitions continued with very little if any variation till towards the middle of *R.* 2. and then ſome were directed *al roy et al noble ſeigneurs aſſemble en parlement*; which latter titling became more common and ordinary in the time of *H.* 4. and ſo downward.

BEFORE 8. *E.* 1. it ſhould ſeem, that as well parliamentary as other private petitions of this nature were received by the council themſelves, either immediately, or by the hands of the clerk of the council. But enſuing times made great changes in the manner of tranſmitting of parliamentary petitions to the council.

CLAUS. 8. *E.* 1. Ryley 442. It was then ſettled, that the parliamentary petitions ſhould according to their ſeveral natures be delivered to the judges of the reſpective courts to whoſe juriſdiction they did reſpectively belong, viz. ſuch as concerned the chancery to the chancellor, ſuch as concerned the exchequer to the exchequer, ſuch as concerned other courts to other courts (only if the buſineſs was great or merely depended upon the king's grace, then the king to be acquainted with it, before any thing be done by them therein) and that ſo no petition come to the king or his council by other hands, that ſo they might have leiſure to attend the weighty buſineſs of the kingdom, &c.

CLAUS.

CLAUS. 21. *E.* 1. *m.* 7. *in ſcedulâ,* Ryley 459. it was ordained, *que toutes petitions, que deſi en avant ſerrunt liverées en parliament, ſoient liverées a ceux que le roy aſſigne a recevoir les, et que toutes les petitions ſoient tot a primer apres qu'ils ſont receves bien examines : et que cels que touchent la chancelaire ſoient miſes en un lyaz ſeveralment, et autres que touchent les eſchequer en autre lyaz, et auſſi ſoit fait de cels que touchent les juſtices et puis celes que, et puis celes que ſerront devant le roy et ſon conſail ſeveraument en autre lyaz, et auſſi celes que averont eſte reſpondu devant en ſeveral lyaz. Et auxi ſoient les choſes report devant le roy devant ceo qu'il les commence a deliverer.*

CLAUS. 3. *E.* 2. *m.* 23. *in ſcedulâ,* Ryley 524. which was after renewed *in totidem verbis.*

CLAUS. 3. *E.* 3. *m.* 13. *in ſcedulâ,* the receivers of petitions in ſuch form as they were after in effect uſed were eſtabliſhed at the requeſt of the commons, viz. article *le ſiſme, que les chevalers gents de cityes de burghs et autres vills, que ſont venus a parlement par ſon commandement pur eux et pur le people, et ont petitions a liverer pur torts et pur grevances faits a eux, que ne poent eſtre redreſſe par commune ley ne en autre manere ſans ſpecial garrant, il ne trove home, que leur petitions receive ſi come ſoloit eſtre en temps le roy ſon pere en parlement, et de ce prient le grace et remedy.—Le roy voet, que en ſes parlements deſormes gents ſoient aſſigne a receive petitions, et qu'ils ſoient delivres par ſon councell auſſi come eſtre ſoloit en temps ſon pere.—Delivres par ſon councell* is intended of diſpatched or anſwered by the council.

BUT although the council received the petitions from the hands of the receivers; yet they rarely (if at all) exerciſed any deciſion or deciſive juriſdiction upon them, but only a kind of deliberative power, or rather direction tranſmitting them to the proper courts places or perſons where they were proper to be decided, and ſometimes wholly diſmiſſing them becauſe no law is ordained in the caſe or *ne poet eſtre fait ſans novel ley.* Hence it is, that moſt of the an-

ſwers, that the council gave, were in nature of remiſſions of the petitions to thoſe perſons or courts, that had properly the cognizance of the cauſes.

If the parliamentary petitions were a mere matter of grace, or concerned the king moſt immediately in point of intereſt, the indorſement was *coram rege.*

If the petition were properly relievable in the ordinary courts of law, the indorſement was, *ſequatur ad communem legem.*

If the buſineſs concerned the ordinary proceedings in the chancery, then the anſwer was, *mittatur iſta petitio in cancellariam, et ibi fiat juſtitia*; and if there were matters of fact inquirable in order to the determination of the petition, *mittatur iſta petitio in cancellariam, et cancellarius faciat commiſſionem ad inquirendum de contentis in petitione* returnable into chancery, *et ſubinde fiat juſtitia per cancellarium.* Theſe kinds of inquiſitions were thoſe, that came under the title of *brevia regis* in the tenures, which were inquiſitions taken by commiſſions and returned into chancery, and hereupon ſometimes *amoveas manus*, ſometimes *ſcire facias* granted.

If the buſineſs concerned the exchequer, then the petition was ſent into the exchequer, ſometimes without writs directing their proceedings, ſometimes with writs to the treaſurer and barons to make allowances or diſcharges, as the caſe required.

So that I do not find any conſiderable difference in the proceedings of the council, either in parliament upon parliamentary petitions, or out of parliament in the other petitions to the council, as to point of deciſion or determination of petitions tarrying before them; for the greateſt buſineſs they did or juriſdiction they exerciſed therein was remiſſion of petitions to their proper and ordinary juriſdiction.

Only

ONLY there were theſe differences between the remiſſions.

THE ordinary petitions *de conſilio* were commonly remitted to the ordinary courts or places, where they were determinable as above.

BUT parliamentary petitions, that came to the council from the receivers either mediately or immediately, had two kinds of remiſſions, that were not ſo uſual nor indeed practicable out of parliament, which were principally theſe two.

1. WHEN the *auditores petitionum* were appointed in parliament, as we ſhall ſee in the next Chapter, they were antiently for the moſt part certain ſelect lords choſen by the king, ſometimes ſuch as were of his council, ſometimes others added, and a ſelect number of the judges, together with the chancellor and treaſurer, which were a kind of committee of the council. And ſometimes the petitions, that came to thoſe *auditores petitionum*, were by them referred to the whole *conſilium ordinarium*, and accordingly the petition was indorſed *coram conſilio*.

AND therefore in the parliament roll of 8. *E.* 2. there is a ſpecial titling of one of the rolls, viz. *m.* 5. *coram toto conſilio*; and the next roll after, viz. *m.* 6. *reſponſiones coram rege et magno conſilio*; which ſeems to enforce the difference.

AND yet amongſt theſe very petitions, that were anſwered *coram rege et magno conſilio*, the words *totum conſilium* and *magnum conſilium* are uſed promiſcuouſly.

ROT. *parl.* 8. *E.* 2. *m.* 6. *petitio hominum de* Leſwithiel concerning the coinage of tin, the anſwer is, *videtur auditoribus petitionum*, that the

the coinage ſhould be at Leſtwithiel, *recitatis petitione et reſponſione coram toto conſilio, placet regi et conſilio, quòd præmiſſa fiant.*

ROT. *parl.* 8. *E.* 2. *m.* 6. the titling of the record is, *reſponſiones coram rege et magno conſilio in parliamento. Ibidem, m.* 6. *pro comite Athol. Ceſt petition fuit lue par commandement noſtre ſeigneur le roy en plein parlement devant prelats countes et barons et tous autres, et reſpondue par aſſent.*

IBIDEM, *m.* 7. under the ſame title of *reſponſiones coram rege et magno conſilio* in the caſe of a prohibition to the biſhop of Chicheſter and a petition thereupon to the king and his council, *Reſp. Videtur conſilio, quòd forma brevis non eſt concepta ſecundùm uſum cancellariæ, unde conſulendum eſt ſuper hoc cum domino rege. Poſtea habito colloquio ex parte magni conſilii cum domino rege concordatum eſt, quòd breve revocetur.*

2. AGAIN, many times the *conſilium ordinarium* by their indorſement ſent the petition *coram magno conſilio*, and ſometimes *coram rege et magno conſilio* in caſes of great weight and difficulty; and the like was done alſo by the *auditores petitionum.*

BUNDELLA *petitionum incerti temporis Ed.* 3. Ryley 651. in the caſe of the prior of Tykford, there are two indorſements, one by the *conſilium ordinarium*, or at leaſt *per auditores petitionum, viz. coram rege et magno conſilio*; the other it ſeems by the *magnum conſilium, le conſeil ne aſſent point, que ceſt choſe ſoit faite.* The like *ibidem* in the caſe of Sturmy *coram rege et magno conſilio*, and then by the grand council *declare queux profits.*

AND ſometimes the anſwer of the *auditores* or of the *conſilium ordinarium* being read before the grand council, the former anſwer was corrected

corrected and altered by another anſwer of the grand council, ſo that they were a check and controul upon them.

ROT. *parl.* 8. *E.* 2. *m.* 10. *dorſ.* upon a complaint made of *champerty* by Cecilia Beauchamp againſt William Inge, the anſwer of the *conſilium ordinarium* is corrected by the grand council. *Videtur conſilio, quòd nullum remedium poteſt fieri verſus Willielmum de Inge antequam inquiratur de facto vice-comitis. Poſtea petitio illa lecta coram magno conſilio viſiſq. ſtatutis, &c. dictum eſt, quòd capiat breve nomine regis verſus Willielmum Inge, ſi ſibi viderit expedire. Eodem rotulo et m.* . upon the petition of Thomas Haſtings, *Videtur conſilio, ſi domino regi placeat, quòd dicta cuſtodia eſt reſumenda in manum regis, &c.* But afterwards in the ſame roll the former petition and anſwer being remitted *coram magno conſilio* received quite a different anſwer.

IN the ſame parliament roll * Joan Borreſden prayed, that ſhe might not be barred by the warranty of her mother without aſſets to demand the heritage of her father. The *conſilium regis* were of opinion ſhe ought not to be barred, and that it was within the reaſon of the ſtatute of Glouceſter. But the *magnum conſilium* diſliked this anſwer, and gave another, viz. *quia petitio illa non poteſt finaliter expediri ſine explanatione, ideo oſtendatur coram majoribus, et fiat inde explanatio.*

NOW what this *magnum conſilium* in parliament was, partly appears by what hath been before ſaid; and I ſhall further illuſtrate it.

(1.) IT was not meant of the *conſilium ordinarium*; for by what goes before it appears, that the anſwers by the *conſilium* and the *magnum conſilium* were many times different; and the latter ſometimes allowed,

* It is the roll not of 8. *E.* 2. but of 8. & 9. *E.* 2. *m.* 2. *dorſ.*—F. H.

ſometimes

ſometimes corrected the anſwer as well of the *conſilium ordinarium* as the *auditores petitionum*.

(2.) It was not intended of both houſes of parliament; and the rather, becauſe in the firſt and ſecond membrane of that parliament touching the hoſpital of St. Thomas of Acon *coram conſilio*, and the hoſpital of North Allerton *coram magno conſilio*, and from thence adjourned into chancery, the petitions were both begun in the lords houſe.

(3.) And it ſeems to me, that it was not barely the houſe of lords, as it conſiſted ſingly of the prelates and nobility; and eſpecially for this reaſon.

I have before obſerved, that theſe petitions of the commonalty, that are entered upon the parliament roll, are ſuch as were aſſented to by the lords of parliament. For, 1. We have no reaſon to think the lords, in whoſe houſe the parliament roll was entered, would have entered it among the records of that houſe. 2. We have no other evidence of their conſent, but that entry; and yet we are ſure they could not paſs into a law without it.

And yet we ſhall find in many parliament rolls many of the commons petitions, that were there entered upon the parliament roll, referred to the grand council, which could not be reaſonably applied only to the lords in parliament, who had before given their conſent to the petition. *Vid. rot. parl.* 50. *E.* 3. *n.* 182. *et* 179. 178. 176. 172. 160. 141. 140. and many more.

I think therefore the *magnum conſilium* in parliament was the lords houſe, as it had united or joined to it the *conſilium regis ordinarium*, a council within a council; and that in antient time thoſe things, that were

were tranſacted in the *magnum conſilium*, came as well under the ſuffrage of the chancellor, treaſurer, juſtices, and barons of the exchequer, as the lords. Indeed they had no voice in paſſing of laws; but in matters and points of juriſdiction and judicial proceedings they ſpake their judgment and gave their reaſons.

AND although in proceſs of time they came only under the notion and title of aſſiſtants; yet they were aſſiſtants of ſuch a nature quality and weight, that their advice guided matters judicial and judicial proceedings in the lords houſe. But of this hereafter.

BY what hath been before ſaid,

(1.) IT ſeems, that in many times the anſwers given by the *auditores petitionum* were viewed by the *totum conſilium*, and read before them, and ſometimes before the *magnum conſilium*; but commonly if the parties concerned in the anſwer were not ſatisfied with the anſwer, the party concerned did obtain a review of the anſwer by the council or the *magnum conſilium*, which ſometimes affirmed, ſometimes corrected the anſwer.

(2.) THE like may be conjectured of the anſwers given by the *conſilium ordinarium*. They were read before the *magnum conſilium*, either of courſe or at the inſtance of the party concerned; and ſometimes affirmed, ſometimes corrected, by the *magnum conſilium*.

(3.) THAT though the ordinary courſe of receiving parliamentary petitions, and handing them over to the *conſilium ordinarium*, or to the *auditores petitionum*, was by the receivers appointed by the king; yet it was not always ſo. For, 1. It ſeems, that the *petitiones communitatis*, whether general or in the behalf of particular or private perſons, were immediately delivered to the lords by the commons, or their ſpeaker or meſſenger by them ſent. 2. That many times, when

great perſons were petitioners, or if they could get the favour of the houſe, private petitions were read immediately in the houſe of lords, and there anſwered or proceeded in as the caſe required: and ſuch were oftentimes entered upon the parliament rolls, as appears in moſt parliaments in the beginning of the parliament rolls.

And thus far touching the receiving and tranſmitting of petitions by the receivers, ſometimes to the *conſilium regis*, ſometimes to the *auditores petitionum*, ſometimes to the lords houſe or *magnum conſilium*. Only I ſhall add this one thing, that as in the beginning of the parliaments, eſpecially after 3. *E.* 2. the king appointed the receivers of petitions; ſo there was always a ſhort time prefixed, within which parliamentary petitions ſhould be delivered, ſometimes a week or leſs, to prevent the overcharging of the parliament with private petitions.

CHAP.

CHAP. XII.

CONCERNING THE AUDITORS AND TRIERS OF PETITIONS.

THE firſt day of the parliament the king appointed the receivers of petitions, commonly three for England, and three for Ireland Wales Gaſcony and foreign parts, and prefixed a time for the delivery of petitions to them.

HE did likewiſe appoint two ranks of auditors or triers of petitions, viz. ſome for England, and ſometimes for England Ireland and Wales, &c. and ſome for foreign parts. I ſhall meddle principally with thoſe, that concern England.

THIS nomination of auditors of petitions was very antient; for though in the moſt antient times, as hath been before obſerved, the *concilium ordinarium*, for the moſt part, if not altogether, anſwered parliamentary petitions of private perſons (for I ſpeak only of theſe) yet to diſburthen the council of that great incumbrance, that they might the better employ themſelves in matters of public importance, theſe *auditores petitionum* were ſubſtituted, and gave anſwers to parliamentary petitions. For we find as antiently as 8. *E.* 2. anſwers given to ſuch petitions by the *auditores petitionum*.

ROT. *parl.* 8. *E.* 2. *m.* 3. Upon the petition of Katherine Giffard the anſwer is, *videtur auditoribus petitionum*; and *m.* 6. *dorſ.* upon the petition of the town of Leſtwithiel, *videtur auditoribus petitionum, &c.* Yet the petitions were to the king and his council.

THESE were ſtiled *auditores petitionum*, and aſſigned ſometimes *pur oyer les petitions*, and ſometimes *pur reſponder al petitions*, and ſome-

times *pur oyer et tryer les petitions:* and this ſtile they continued in their aſſignation until after 28. *E.* 3. And during all that time they had power to indorſe an anſwer to petitions. This appears by their authority deſcribed by the king in the declaration of the cauſe of ſummons, *rot. parl.* 28. *E.* 3. *n.* 3. *Le tierce cauſe eſt, que ceux, que ont petitions a mitter en parlement pur grevances ou d'autres beſoignes, que ne purroient eſtre exployt hors de parlement, les liveront as clerks ſouſecryes de les mettre en parlement, et le roi aſſignera certeins prelatz et autres grantz de les reſpondre & ent faire droit.* And then the receivers and auditors of the petitions are named.

But after 28. *E.* 3. they loſt the name of *auditores petitionum*, and only were aſſigned to be triers; whereby we may reaſonably conjecture, that after 28. *E.* 3. they gave not anſwers to petitions, but only examined, whether they were proper for the parliament, and then delivered them over, either to the *conſilium regis*, or to the *magnum conſilium*, to anſwer.

And poſſibly this may be the reaſon of the petition of the commons in parliament, *rot. parl.* 36. *E.* 3. *n.* 31. *Item pur tant que ceſt parlement feuſt ſummon pur redreſſer divers miſchiefs et grevances faites al commons, et que cheſcun que ſe ſentit greve mettroit ſon bill, et ſerroient les ſeigneurs et autres aſſignes de les oyer; les queux ſeigneurs iſſint aſſignes, ſi nien touche le roy, font endocer les billes coram rege, et iſſint riens eſt fait, ne les grevances de riens redreſcez: pleſe a ſa bone grace d'ordeiner, que les ditz bills ſoient veues devant les dits ſeigneurs et chaunceller et treſorer et autres de councell de roy, reſpondus, et endoces, en manere, come droit et reaſon demandent, pur Dieu et en oevre de charité; et ce devant le departir de dit parlement.*—Resp. *Le Roi le voet.*

For indeed thoſe petitions were indorſed *coram rege*, that concerned more eſpecially his intereſt or his ſpecial grace, and were referred to the king himſelf. Yet *vid. rot. parl.* 14. *E.* 3. *n.* 29. one biſhop, one

one earl, one baron, and five judges, calling the chancellor and treaſurer when needful, were ſpecially aſſigned to ſit upon the petitions *coram rege*, beſides the general auditors of the other petitions.

THE firſt direction and ordering of the petitions in parliament by the *auditores petitionum* in the time of Edward the third is that in the parliament of *Hil.* 6. *E.* 3. *m.* 1. 2. & 3. where were aſſigned by the king three biſhops, two barons, and four juſtices, *a tryer et terminer les petitions d'Angleterre*; and others for foreign petitions. And it was accorded, that they calling the chancellor, chief juſtice, and treaſurer, or ſome of them, ſhould proceed to try and determine the petitions; and that the petitions ſo tried and determined by them be ſent into the chancery under one of their ſeals, and that the remnant of petitions ſhould remain in the hands of the clerks receivers under the ſeals of the tryers till the morrow, and ſo from day to day; *et que les petitions, que ſont a tryer et determiner devant le roy, ſoient tryes devant lui, appelles a lui tiels come il voudra; et que meſmes les petitions demourgent ſouth les ſeals des auditeurs ou aſcun de eux, tanque ils ſont reportes devant le roy.*

AND becauſe theſe *auditores petitionum* after their conſtitution did anſwer private petitions in parliament, and ſupplied the place of the *conſilium ordinarium*, and eaſed them, and the buſineſſes that came before them was for the moſt part in relation to ſuits at law and injuries, the perſons, that were antiently nominated *auditores querelarum*, were for the moſt part ſuch, as were of the council judges and men of ability for that employment. But in after-times, as the grandeur of the lords prevailed, ſo by degrees the power of the auditors and *conſilium* decayed, by ſurcharging them with a numerous company of prelates and lords, which poſſibly were unacquainted with matters of this nature; and ſo the diſpatches by the auditors and *conſilium* were impeded and incumbered.

I WILL

I WILL therefore take an eſtimate of the *auditores querelarum* and their quality, as they ſtood antiently, and how gradually they were altered.

14. *E.* 2. *rot. parl.* Ryley 186. for anſwering the petitions of England, three biſhops, one abbot, two barons, and five judges.

ROT. *parl.* 14. *E.* 3. *n.* 21. four biſhops, two earls, three barons, four judges.

ROT. *parl.* 15. *E.* 3. *n.* 3. two biſhops, two earls, two barons, three judges.

17. *E.* 3. two biſhops, two earls, two barons, four judges.

18. *E.* 3. two biſhops, two abbots, two earls, three barons, four judges.

20. *E.* 3. one biſhop, one abbot, one baron, four judges.

21. *E.* 3. three biſhops, one abbot, one prior, two earls, four barons, four judges.

25. *E.* 3. three biſhops, three earls, two abbots, one baron, four judges.

28. *E.* 3. three biſhops, three earls, one abbot, two barons, four judges.

AND in all theſe caſes the chancellor and treaſurer were alſo to be called, when there was occaſion. How many, or which of the biſhops, earls, or barons, were of the council, it doth not appear. Poſſibly many of them were ſuch. But hitherto there was a reaſonable balance held in the conſtitution of the *auditores querelarum*, between the

the prelates and nobility of one part, and the chancellor treaſurer and juſtices of the other part.

But afterwards, viz. after 28. *E.* 3. when theſe *auditores* became only tryers, the proportion of the nobility and prelates much exceeded.

36. *E.* 3. ſix biſhops, two abbots, three earls, one baron, three judges.

37. *E.* 3. four biſhops, three abbots, one duke, four earls, five barons, five judges.

50. *E.* 3. nine biſhops, two abbots, five earls, three barons, four judges, calling the chancellor treaſurer ſteward and chamberlain, as there ſhould be occaſion.

And afterwards the number of the nobility rather increaſed among the tryers.

So that as in time the ſubſtitution of the *auditores petitionum* took up much of that buſineſs, which was before done by the council; and as they grew to be only tryers of petitions; ſo their authority leſſened. And now the very tryers of petitions ſeem to be but a piece of formality; for the buſineſs formerly tranſacted by the *conſilium* auditors or tryers is now for the moſt part tranſacted in the lords houſe, or by committees of petitions, and other committees of their own nomination.

CHAP. XIII.

A BRIEF RECOLLECTION OF WHAT HATH BEEN SAID TOUCHING THE POWER AND JURISDICTION OF THE *CONSILIUM REGIS* AND THE *AUDITORES PETITIONUM.*

I HAVE in the foregoing Chapter gathered out of old and obſcure records the *conſilium regis*, who they were, and what their power both out of parliament and in it; and have brought them to their conjunction with the houſe of lords in parliament, and ſo making up that great court and council called the *magnum conſilium.* I have alſo conſidered the *auditores petitionum*, and what they were, and how they ſupplied the place of the *conſilium regis* in anſwering parliamentary petitions, and their various conſtitutions and modifications.

IT will not be amiſs to make a ſummary collection of ſuch things as have been before promiſcuouſly delivered touching the *conſilium regis*, as may be of uſe in what follows.

1. THE *conſilium*, though in conjunction with the houſe of lords in parliament, had never any voice in paſſing of bills or in the legiſlative power; but the ſame reſided in the king the lords of parliament and the commons.

2. BUT herein they had only a power of advice and aſſiſtance when called thereunto: which power of advice had a double reſpect; one to the lords, to aſſiſt and adviſe them in paſſing bills; another to the king, when the bill paſſed both houſes, to give the king their opinion touching ſuch queſtions as ſhould be by or for him moved in council touching the ſame; for both which advices they were qualified by their experience, education, and learning, and by being preſent

preſent in the lords houſe or at the committee appointed touching ſuch bills and hearing the debates.

3. THEY had no voice in the trial of a peer, unleſs they were peers themſelves; but were only aſſiſtants to the court of high ſteward to give their opinions in matters of law when required by the court.

4. THEY had of right no juriſdiction to proceed criminally to cenſure any perſon, becauſe reſtrained by the acts of 25. *E.* 3. and 42. *E.* 3. But before that time, at leaſt when in conjunction with the lords houſe, they did together with the lords exerciſe a juriſdiction in criminals. And ſome few inſtances of criminal proceeding before the *conſilium regis* were uſed, ſome by virtue of certain acts of parliament giving them juriſdiction in ſome caſes, and ſome by way of uſurpation, till 3. *H.* 7.

5. THEY had not power to determine rights of freehold between party and party; for it is reſtrained by the ſtatute of 25. *E.* 3.

6. THEY had power in conjunction with the lords to proceed in errors upon judgments in the king's bench, until by degrees that power was appropriated to the lords; but even then their advice in matters of law ought *de jure* to be demanded, and without apparent and great cauſe to be followed.

7. BUT out of parliament they had no power to hold plea upon writs of error, but had only an aſſiſting or adviſing power. 39. *E.* 3. 14. 1. *H.* 7. 19.

8. THEY had power, both in parliament and out of parliament, upon petitions coming before them, to remit and ſend the petitions, ſometimes by writ, ſometimes by indorſement, ſometimes with particular direction, ſometimes with ſpecial directions, ſometimes only

generally, to the proper courts to which the remedy of the matter complained of belonged; but not to determine finally cauſes, that were relievable in other courts.

9. THEY had power, both in parliament and out of parliament, to proceed to the determination of ſome cauſes, that more ſpecially concerned the king's intereſt; ſometimes by virtue of an indorſement by the king *ſoit droit fait*, as in petitions of right; ſometimes by their own power, as in caſes of aid-prayer of the king, *procedendo in loquelâ et ad judicium*, *ſcire facias* to repeal patents, partitions, dower, and liveries of lands in ward to the king, traverſes, *monſtrans de droit*, *idiotâ examinando*, *ætate probandâ*, and ſome others. And theſe were ſometimes determined by this *conſilium* in parliament, ſometimes out of parliament; but moſt commonly by the chancellor and council, and of latter times by the chancellor with the advice of the council.

10. BUT in all caſes, where a matter of fact was either put in iſſue or inquirable, it was not done as now in chancery by examination of witneſſes, unleſs in caſe of examination of an ideot: but either the fact was inquired preparatorily by an inquiſition taken by virtue of a commiſſion out of chancery; or if an iſſue were joined, it was ſent into the king's bench to be tried, and then judgment was given in the king's bench, and ſo it is to this day. To this purpoſe ſee the notable record *rot. parl.* 9. *E.* 2. *m.* 7. where upon a complaint in parliament by Badlemire, conſtable of the caſtle of Briſtol, for divers riots and miſdemeanours, they were called *coram conſilio*, and the defendants by attorney appeared and pleaded not guilty, and a jury of twenty-four knights returned *coram conſilio* found them guilty, and they made fine to 4000 marks. *Vid. ſimile rot. parl.* 5. *R.* 2. *n.* 43. where Clivedon accuſed Cogan in parliament of treaſon, and he pleaded not guilty, *et de hoc ponit ſe ſuper patriam*, and the caſe thereupon diſmiſſed to a trial at law.

AND

And this held, not only in the caſes mentioned laſt, wherein they had a deciſive power *de jure*, or in caſes criminal or civil depending before them before 25. *E.* 3. but alſo in thoſe caſes, wherein they by their power ſometimes uſurped juriſdiction after that ſtatute. For trial of cauſes by witneſſes examined by commiſſion was brought in by clergymen, who were chancellors, and were either doctors of the civil law and canon law, or much favoured it; though now by its long uſage it is not in prudence to be ſhaken.

CHAP. XIV.

CONCERNING THE LORDS HOUSE AND THEIR JURISDICTION.

THE lords houſe may be conſidered two ways.—1. Either ſimply as conſiſting of the lords ſpiritual and temporal; and upon that account they had a voice in the legiſlative power; and the *conſilium regis ordinarium*, whether judges or others, unleſs they were alſo lords of parliament, had no voice at all with them, but were and ſtill are only to adviſe and aſſiſt when called thereunto.—Or 2. as the *magnum conſilium*, conſiſting of a conjunction of the lords of parliament and the *conſilium regis*.

Now whether their exerciſe of juriſdiction, that is, deciſion of cauſes civil or criminal, were lodged in the houſe of lords in the firſt capacity or in the ſecond, or in neither, is here conſiderable.

And it ſeems, that in two ſpecial caſes they had and ſtill have juriſdiction ſimply in the firſt capacity; namely, 1. in caſes of breach of their privilege by arreſts or ſuits in inferior courts:—2. in caſe of trial of a peer in caſe of treaſon felony or miſpriſion of treaſon by temporal lords.

But as to other cauſes, eſpecially between party and party, or in criminal cauſes that concern not peers in capital offences, miſpriſion of treaſon, &c. we muſt diſtinguiſh the times.

In antient times, eſpecially in the time of *E.* 1. they did *de facto* exerciſe a civil and criminal juriſdiction, and had a great current of practice and countenance of law in ſo doing, as appears by the numerous judgments given by them in the time of *E.* 1. *libro parliamenti*.

And it ſeems, that this juriſdiction was ſo exerciſed in thoſe times in the ſecond capacity; not ſimply as they were lords of parliament; but as together with the *conſeſſus conſilii ordinarii* they made up that great court called *magnum conſilium in parliamento* or *curia parliamenti.*

And this I am perſuaded to believe upon theſe accounts ſpecially.—1. Becauſe the ſummons of the lords is *ad tractandum ſuper arduis negotiis regni:* and though it is not impoſſible that under that general title they may be ordinary judges of private differences between party and party; yet ſuch ſeem to be too low and inferior to the end and reaſon of their convention; and if it were admitted would poſſibly conſume their time about petty things, to the detriment of the great end and buſineſs for which they were called, *ardua negotia eccleſiam et regnum concernentia.*—2. Becauſe we ſhall find the *conſilium regis* great officers and judges gave their conſents and ſuffrages with the lords in parliament, as appears by thoſe many inſtances that all are in the *placita parliamenti E.* 1.—3. Becauſe when the cauſes deduced by petition in parliament were not ſent to the ſeveral courts, as was uſual, but finally decided in the lords houſe; they were many times determined by the *conſilium ordinarium,* if they were ſmall and of little moment, or if the lords were taken up with matters of greater moment.

And thus ſeems to be the ſtate of this buſineſs in thoſe elder times.

But in later times it grew to be otherwiſe. The lords being great men did by degrees gain ground upon the *conſilium ordinarium,* eſpecially about the time of *R.* 2. and ſo downwards, and the authoritative juriſdiction was claimed and uſed by the lords ſpiritual and temporal; and the concurrence of the judges and *conſilium ordinarium* was uſed by way of aſſiſtance, though not without great deference and reſpect. So that as in the legiſlative juriſdiction the judges and *conſilium ordinarium* were but to adviſe and aſſiſt when called; ſo it

was

was alſo uſed in matters of juriſdiction where cauſes came to be heard in the houſe of lords.

As to the king's conſent in matters of contentious juriſdiction, it is frequently mentioned in the judgments given in the lords houſe, as well antiently as of latter times.

THIS aſſent of his was of two kinds.—1. Actual, which was many times *de facto* given, but rarely if at all denied, when the houſe gave their judgment. And this conſent of the king is entered of record very frequently, as we ſhall have occaſion to ſee hereafter.—2. Virtual: for although the king gave not his actual aſſent; yet, it being ſuppoſed that the juriſdiction was lodged in the *magnum conſilium*, or the houſe of peers by the law of the land being convened by the king's writ, it was taken, that the king's conſent is involved, though he were not actually preſent. *Voluntas regis in curiâ lucet, non in cameră.* 2. *R.* 3. as when a judgment is given in the king's bench, it is ſuppoſed to be virtually given by the king, when done by virtue of his commiſſion authority and the law of the land.

ALL this hitherto in this Chapter is ſaid only by way of conceſſion or admiſſion of the juriſdiction of the houſe of lords in deciſion of cauſes. But that ſhall be more ſtrictly conſidered and examined in what follows.

CHAP.

CHAP. XV.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE SPECIALLY: AND FIRST CONCERNING THEIR JURISDICTION IN THE FIRST INSTANCE.

THE juriſdiction, as ſometimes it hath been *de facto* exerciſed, and hath been heretofore by ſome diſputed, is of two kinds.—1. That, which is exerciſed in the firſt inſtance or by way of original ſuit or petition.—2. That, which is exerciſed in the ſecond inſtance, either by way of adjourning cauſes thither, or by way of writ of error or appeal.—As to the former of theſe, namely, juriſdiction of cauſes in the firſt inſtance, they are in their natures of two kinds: 1. ſuch as are criminal cauſes; 2. ſuch as are civil cauſes.

AND certain it is, that *de facto* ſometimes they have taken cognizance of cauſes by petition in the firſt inſtance, as well antiently when the *conſilium regis* ſeemed to have a concurrent voice, as ſince they came to be aſſiſtants only.

AND although the moſt ordinary and indeed the true legal method of handling parliamentary petitions, as well by the *conſilium regis* when before them, as the *auditores petitionum* when before them, and the *magnum conſilium* or houſe of lords when before them, was not to decide them, but to remit them to proper ordinary courts of juſtices, ſometimes generally, ſometimes with ſpecial direction; yet it cannot be denied, but that ſometimes, as well antiently as modernly, the *magnum conſilium* or lords houſe in parliament did proceed to decide and determine cauſes brought before them by original petition. But how far or how juſtly by the laws of the land this might be done, ſhall be conſidered, (1.) in general; (2.) in ſpecial,

cial, under the ſeveral diſtribution of theſe original cauſes into cauſes criminal and cauſes civil.

(1.) CERTAINLY the original cognizance of cauſes in the lords houſe was always highly incongruous and prejudicial to the people in many reſpects: as—1. By reaſon of the great attendance that it required, in as much as neceſſarily theſe cauſes and their hearing muſt give way to weightier matters.—2. In reſpect that parliaments were of no long continuance anciently, and many times prorogued or diſſolved before ſuch cauſes could be heard, and then the ſuitor and defendant loſt their labour and expence in attendance.—3. The ancient courſe even in parliament was, if a matter were put in iſſue, that either commiſſions iſſued out of chancery to try the point returnable thither, or elſe the record was ſent into the king's bench to try, who alſo gave judgment; ſo that they were fain to go through ſeveral courts before they could come to a concluſion of the cauſe. I never read of any trial in capital cauſes by a jury at the lords bar, but only in the caſe of Thomas lord Berclay, 4. *E.* 3. for the death of *E.* 2. *de quo infra.*—4. The modern courſe of trial by examination of witneſſes, either *vivâ voce* or by commiſſion, is ten times worſe, becauſe the lords are thereby judges of fact as well as of law; and whereas if a jury give a falſe verdict an attaint lies, here he is remedileſs if the lords make a wrong collection or concluſion upon witneſſes, and the party has loſt that trial that the law of the land and *Magna Charta* ſo much aſſert, the *legale judicium parium ſuorum.*—5. But that, which is more than all the reſt, the lords are great perſons; and if they give judgment againſt law, there is no appeal to any but themſelves. If there be an appeal to the houſe of commons, the lords will not allow it: if to both houſes, the ſame muſt paſs through the houſe of lords, who will be doubtleſs partial to their own judgment once given: if the appeal be to another parliament, it is true the lords may reverſe the judgment given by themſelves; but who can expect they will do it?

THE

THE wiſdom of the laws of England is remarkable in theſe particulars.—1. That although the judges are conſtituted by the king and choſen out of learned men knowing in the laws; yet they are not nobles, nor peers of parliament, or ſuch as would be too great to be called in queſtion for corruption, or their judgments to be examined if there be cauſe.—2. That the ordinary courts of juſtice are ſtill under the check of a review by writ of error, if there be cauſe: the judgments in the common pleas examinable in the king's bench, thoſe for the moſt part in the exchequer chamber, thoſe in the exchequer before the chancellor and treaſurer, and all of them either mediately or immediately in the court of parliament.

BUT to begin with an original petition in the lords houſe, which is now ſimply the court of the laſt reſort for appeals, is prepoſterous and infinitely prejudicial to the people.

So that if we may judge what is unlawful by what is highly inconvenient, we have no reaſon to think ſuch a kind of juriſdiction in original ſuits was lodged in the lords houſe.

(2.) BUT beſides this topic of inconvenience, there are not only ſundry petitions of the commons againſt this kind of proceeding in the lords houſe; but the ſtatutes of 5. *E.* 3. *cap.* 9. 25. *E.* 3. *ſt.* 5. *cap.* 4. & 42. *E.* 3. *cap.* 3. are general, that none be put to anſwer in criminals without preſentment, nor touching his freehold without due proceſs of law, which extend to all courts, and ſome of the parliamentary petitions againſt proceedings upon ſuggeſtion even in the court of parliament.

BUT I ſhall deſcend to particulars.

CHAP. XVI.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN CRIMINAL CAUSES.

CRIMINAL cauſes are of two kinds.—1. Such as are capital, where the judgment is loſs of life, as treaſon and felony.—2. Such as are leſs than capital, where judgment commonly is fine, impriſonment, and ſometimes other corporal puniſhment, as the pillory, &c.

As to the former of theſe, there were anciently in parliament theſe ſeveral ways of proceedings.

1. By way of authoritative declaration of treaſon purſuant to the clauſe of 25. *E.* 3. touching treaſons not therein ſpecified. And this was and ought to be done by the king lords and commons by act of parliament *. And this equally concerns all perſons whether peers or other. Such were the declarations of treaſons touching John Imperial *rot. parl.* *R.* 2. the treaſon of † for breaking priſon, *rot. parl.* *H.* 6. And therefore the declaration of the lords only acquitting the fact of the earl of Northumberland from treaſon *rot. parl.* 5. *H.* 4. being only by the lords, was not ſuch a declaration as was warranted by 25. *E.* 3. *de proditionibus.* But this concerns not the buſineſs in hand.

2. There was antiently a courſe, upon an accuſation in the behalf of the king or by his command, to give judgment of death by the lords with the king's aſſent. And ſuch was the proceeding *rot. parl.*

* *Nota*, the caſe of the judgment of the earl of Saliſbury though dead 2. *H.* 4. *n.* 30. was upon a kind of conditional attainder by act of parliament 1. *H.* 4. *n.* . if they ſhould after take part with *R.* 2. *Placita coronæ in parliamento* 1. *H.* 4. *n.* 10. upon the petition of the commons.

† The caſe of ſir John Mortimer in 2. *H,* 6. is probably meant. See *rot. parl.* *v.* 3. *p.* 202.——F. H.

4. *E.*

4. *E.* 3. againſt ſome peers, as Mortimer and Matravers, about the death of *E.* 2. at which time alſo the lord Thomas de Barclay, though he were unqueſtionably a peer of the realm, and was ſummoned to and ſat in divers parliaments before and after, yet waived his trial by peers and pleaded not guilty to the accuſation, *et de bono et malo ponit ſe ſuper patriam*; and a trial was thereupon had by twelve knights and eſquires of the county of Glouceſter *in pleno parliamento* at the lords bar, and by them he was acquitted; – the only precedent that ever I ſaw of a trial of a peer by other than his peers, and that by a jury appearing at the lords bar in parliament.

But beſides theſe peers, that were tried upon an accuſation of treaſon thus exhibited, there were ſome that were not peers had judgment of death given upon them, as Beresford Gurney and others for the ſame offence. But there is a ſolemn memorial entered upon the roll *n.* 6. *ne trahatur in conſequentiam*, viz.

Est *aſſentu et accorde per notre ſeigneur le roy et touts les ſeigneurs en plein parlement, que tout ſoit il que les dits peeres come judges de parlement empriſtrent en la preſence notre ſeigneur le roy a faire et rendre les dits judgements per aſſent du roy ſur aucunes de eux que ne fuerent pas leur peres, et ce par encheſon de murder de ſeigneur lige et deſtruction de celui que fut cy pres de ſanc royall et fitz du roi. Que pourtant, que les dits peres que ore ſont, ou les peres que ſeront a temps a vener, ne ſoient nies tenus ne charges a rendre judgement ſur autres que ſur peres, ne a ce faire. Mes ayent les peres de la terre poer eins de ceo pur touts jours ſoient diſcharges et quites. Et que les avant dits judgments ore rendus ne ſoient my trete en enſample n'en conſequence en temps en venir, par quoi les dits peres puiſſent etre charges deſores d'adjudger autres que lur peres contre le ley de la terre, ſi autiel caſe aveigne, que dieu defend.*

Though this declaration is in part to own their power, but to diſown any compulſion upon them to give judgment upon others than

their peers; yet the concluſion tells us, that ſuch a judgment is againſt the law of the land *. And it is obſervable, that though the caſe then in hand was a judgment of death, yet the tenor of the declaration is general.

AND yet the lords were not as good as their words; for in the caſe of Gomenies and Weſton 1. *R.* 2. though they were no peers, judgment was given againſt them for treaſon; and the like was done in Hall's caſe 1. *H.* 4.

YET it ſeems, even before the ſtatute of 1. *H.* 4. hereafter mentioned touching appeals of treaſon and other miſdemeanors, the party accuſed by ſuch a private impeachment might decline the trial by the lords by examination of witneſſes, and put himſelf upon a trial by the country.

AND thus *rot. parl.* 5. *R.* 2. *n* 43. when Clivedon accuſed Cogan in the lords houſe in parliament for a treaſonable offence, the party impeached, being only a commoner and no peer, pleaded not guilty to the impeachment, *et de ceo il ſoy mette de bone et male ſur le verdit de payis, et ſur ce al fyne de ce parlement fuerent les partyes adjournes devant les juſtices a la commun ley de quant que appartient a ce ley.*

AND this is agreeable to *Magna Charta, cap.* 29. *nec ſuper eum ibimus niſi per legale judicium parium ſuorum.* And this being duly conſidered, may perchance go far in impeachments of commoners, eſpecially by private impeachments, and poſſibly by others, as to the point of trial by examination of witneſſes before the lords in criminal cauſes.

SOME indeed have thought this declaration of 4. *E.* 3. being done

* *Vid. Journ. Dom. Proc.* 2 *July* 1689.——F. H.

thus

thus ſolemnly *in pleno parliamento* was a ſtatute * or act of parliament. But that ſeems not ſo clear. But it was certainly as ſolemn a declaration by the lords as could be made leſs than an act of parliament, and is as high an evidence againſt the juriſdiction of the lords to try or judge a commoner in a criminal cauſe as can poſſibly be thought of: 1. becauſe done by way of declaration to be againſt law: 2. becauſe it is a declaration by the lords in diſaffirmance of their own juriſdiction, which commonly judges chuſe rather to amplify, if it may be, than to abridge.

3. THE third method of proceeding in capital caſes, as alſo ſometimes in cauſes merely criminal, was by a kind of parliamentary appeal by certain lords appellants. Thus it was done in the great proceſs in parliament 11. *R.* 2. by the lords appellants, and afterwards in 21. *R.* 2. by lords appellants of the contrary faction. And this not only, where peers were appealed, but where commoners were alſo appealed, who had in thoſe caſes judgment of death.

4. THE fourth courſe of proceeding even in capital cauſes was by articles of impeachment by the houſe of commons. And this was commonly uſed, not only before the ſtatute of 1. *H.* 4. *de quo infra*, but after, as in the impeachments of Gomenies and Weſton and the biſhop of Norwich 1. & 7. *R.* 2. Lyons and Alice Peres 50. *E.* 3. the duke of Suffolk in 28. *H.* 6. the duke of Buckingham 3. *Cha.* the earl of Strafford in 16. *Cha.* and divers others: and that not only in caſes capital, but ſuch as were only miſdemeanors.

Now to give an account how the law hath been taken touching theſe kinds of proceedings, and what hath intervened touching them.

* The judges in 1689 inclined to this opinion. See *Journ. Dom. Proc.* 2 *July* 1689. —F. H.

1. FOR

1. For the firſt of theſe there is no queſtion; for ſuch declarations by the king and both houſes in purſuance of the ſtatute of 25. *E.* 3. are of the ſtrength of acts of parliament.

2. For the ſecond of theſe, viz. impeachments of treaſon by the king's miniſters, as his attorney generals, this hath been held againſt law, and particularly againſt the ſtatute of 25. *E.* 3. *ſt.* 5. *cap.* 4. before recited. And though it were a turbulent time, yet it was ſo granted by the lords themſelves in the impeachment preſented by mr. attorney Herbert againſt lord Kimbolton and the five members of the houſe of commons, and the proſecution thereby deſiſted from, and the accuſation withdrawn. And indeed the ſtatute of 1. *H.* 4. ſeems to include this caſe.

3. As to appeals of treaſon and miſdemeanors, though they were in uſe at the common law, as appears by Britton *cap.* . and much uſed in parliament, eſpecially in the time of *R.* 2. yet by the ſtatute of 1. *H.* 4. *cap.* 14. all appeals of treaſon and alſo of miſdemeanors in parliament at the proſecution of any private perſon are wholly taken away. For the words are general, that no appeals be from henceforth made or in anywiſe purſued in parliament in time to come. *Vid. rot. parl.* 8. *H.* 6. *n.* 38.

And therefore in this parliament now continuing by prorogation, where the earl of Briſtol delivered in articles intitled of high treaſon and other miſdemeanors againſt the earl of Clarendon, upon a ſolemn reference by the houſe of lords to all the judges, it was unanimouſly reſolved and ſo reported, that both as to the matters of miſdemeanors as well as thoſe of high treaſon this impeachment was againſt law and againſt the ſtatute of 1. *H.* 4. *c.* 14.

It is true, that *rot. parl.* 15. *E.* 3. *n.* 41. there was a judicature ſet up by act of parliament in the lords houſe for miſcarriage of public miniſters, viz. *que ſoient ouſtes et puniſes par le judgement des peres*

peres et autres covenables y miſes; et ſur ce le roy ferra prononcier et faire execution ſans delay ſolonc le judgement des peres en parlement. But this juriſdiction laſted not long; for by the parliament of 17. *E.* 3. *n.* 23. that whole parliament is at once repealed, *et perdu le noſme de ſtatut come cel qu'eſt prejudicial et contraire as leyes et uſages de realme et as droits et prerogatives de noſtre ſeigneur le roy,* and was never enacted again.

4. But as to a criminal proceeding upon an impeachment ſent up to the lords by the houſe of commons, that was never eſteemed within the prohibition of the ſtatute of 1. *H.* 4. and accordingly it was declared by the judges in that reſolution above mentioned in the caſe between the earls of Briſtol and Clarendon. And the reaſon is; becauſe the accuſation or impeachment of the houſe of commons is in nature of the higheſt preſentment or indictment by the grand inqueſt of the whole kingdom.

In *rot. parl.* 2. *H.* 4. *n.* 30. after the making of the ſtatute of 1. *H.* 4. there was a ſtrange judgment of treaſon given againſt the earl of Saliſbury after his death by the houſe of lords *. *Rot. parl.* 2. *H.* 5. *p.* 1. *n.* 12. a petition of error by his heir was preferred and received by the lords; and among other apparent errors, which are entered *rot. parl.* 2. *H.* 5. *p.* 2. *n.* 13. he aſſigns this for error, that the judgment was given *ſans petition ou aſſent de communes en le dit parlement, queux de droit ſerront peticioners ou aſſentours de ceo que ſerra ordeine pur ley en parlement.* The lords nevertheleſs affirmed their judgment; and in 9. *H.* 5. the earl obtained an act of reſtitution. I only mention it to this purpoſe, that notwithſtanding the ſtatute of 1. *H.* 4. an impeachment by the commons was always

* But *nota* this judgment againſt the earl of Saliſbury after his death was in purſuance of a kind of conditional attainder, if ever he took part with *R.* 2. *Vid. rot. parl.* 1. *H.* 4.

allowed;

allowed; and accordingly it hath been practiſed in all ſucceeding ages ſince.

THE cauſes before mentioned are indeed principally capital cauſes, as treaſon and felony. But withal the reſolutions in the caſe of the earls of Briſtol and Clarendon extend the ſtatute of 1. *H.* 4. to criminal cauſes that are not capital: and the plain words of the ſtatutes of 25. 28. & 42. *E.* 3. againſt putting men to anſwer upon ſuggeſtion without preſentment extend equally to all criminal cauſes as well as capital.

AND yet I muſt grant, that even in criminals the houſe of lords did exerciſe a juriſdiction as well after thoſe ſtatutes as before.

1. IN all caſes, where by ſpecial acts of parliament the king's council had juriſdiction, which are remembered *ſupra* CHAP. IV. there the *magnum conſilium* or the lords houſe had a juriſdiction. And although it ſeems, that at firſt or in the more antient times the lords and *conſilium regis* made as it were but one *magnum conſilium* in parliament; yet when in proceſs of time the whole power was aſſumed by the lords houſe, ſo that they became the court and the judges and others of the *conſilium ordinarium* became but aſſiſtants, the lords in parliament carried with them the authoritative juriſdiction in theſe caſes.

2. WHEREAS by the tacit conceſſion of the commons petition in parliament *rot. parl.* 1. *R.* 2. *n.* 87*. and the fuller enforcement thereof *rot. parl.* 2. *R.* 2. *p.* 2. *n.* 4. both mentioned at large *ſupra* CHAP. IV. there was a looſe left for ſome juriſdiction in the council, where the offenders ſeemed too great for an ordinary proſecution, or the nature of the offence carried on by oppreſſion with a high hand; the houſe

* *Vid. rot. parl.* 1. *H.* 4. *n.* 162. confirming the ſtatute 1. *R.* 2.

of

of lords after the abovementioned ſtatutes did many times interpoſe with their power, and called the offenders before them upon complaint of private perſons. But it rarely ended in any judicial puniſhment, unleſs the parties ſubmitted thereunto; but only a due proviſion to amend the inconvenience.

SUCH were theſe that follow.

ROT. *parl.* 4. *R.* 2. *n.* 17. touching ſome dangerous letters ſuppoſed to be written by Ralph Ferrers found to be forged, and thereupon *rot. parl.* 5. *R.* 2. *n.* 42. diſcharged.

ROT. *parl.* 5. *R.* 2. *n.* 45. a great riot by the town of Cambridge upon the ſcholars. They ſubmit themſelves *de alto et baſſo* to the king's determination; *par vertu de quel ſubmiſſion le roy par advice de prelates et ſeigneurs en ce parlement* ſeizes their franchiſe, and gives part to the univerſity, and reſtores the reſt to the town.

ROT. *parl.* 8. *R.* 2. *n.* 12.* Candiſh upon the complaint of the chancellor for a ſcandalous defamation by a petition. He Candiſh is fined and impriſoned. But this is but purſuant to the act of parliament againſt thoſe, that fail in proof of their petitions.

IBIDEM *n.* 19. the townſmen of Bury adjudged by the lords to be bound to the abbot in bonds with certain conditions, *nient obſtant le commune ley de terre eſt encounter ceſt graunt et ordonnance*; for it was a capitulation by the townſmen by conſent to gain a pardon.

ROT. *parl.* 15. *R.* 2. *n.* 16. upon the petition of the prior of Holland touching a riot and forcible entry, a commiſſion iſſued to a

* There is an error in this reference; *n.* 12. of 8. *R.* 2. being the caſe of Walter Sibill, who was fined and impriſoned for defaming Robert de Vere, earl of Oxford. —F. H.

ſerjeant at arms to take and bring in the rioters. They came and confeſſed the riot, and were committed to the Tower till they made fine to the king, which they did. This is the only caſe of latter times, wherein offenders of this kind were fined: but yet it was agreeable to law; for they had by the act of † cognizance of ſuch caſes.

IBIDEM *n.* 17. the abbot of St. Oſyth complained of oppreſſion and maintenance by John Rokell. He was committed; and after the difference ended by the award of the duke of Guyen.

IBIDEM *n.* 19. Brian committed for putting a papal bull in execution. This was within the cognizance of the lords by the ſtatute of proviſors, which refers it to the *conſilium regis.*

IBIDEM *n.* 20. 21. Hardinge committed to the Tower for a falſe accuſation againſt the archbiſhop of Canterbury. This was but incident to their juriſdiction.

ROT. *parl.* 16. *R.* 2. *n.* 19. Richard Gomeſter complaining of the power and oppreſſion of his adverſary referred to an award; and if not ended that a good jury be returned in the ſuit in the court below.

ROT. *parl.* 17. *R.* 2. *n.* . between Windſor and Scrope touching champerty. The defendant acquitted by the judgment of the lords ſpiritual and temporal.

ROT. *parl.* 4. *H.* 4. *n.* 19. between Pomeroy and Courtney touching a riot, forcible entry, maintenance, and oppreſſion in a ſuit at law. Direction given only that a good jury be returned.

† The original has a blank here.—F. H.

IBIDEM,

IBIDEM *n.* 20. between the abbot of Newnham and Courtney for a forcible entry and other outrages. Courtney committed and ordered to keep the peace.

IBIDEM *n.* 21. Portington againſt the ſame Courtney for oppreſſions and undue obtaining of releaſe. The releaſe, by conſent of Courtney and judgment of the lords and king, thereupon vacated, and a ſpecial aſſiſe directed.

ROT. *parl.* 13. *H.* 4. *n.* 12. between the lord Roſs and Tirwhitt for riots. Referred to the archbiſhop's award, and by him ended.

AFTER the time of *H.* 4. I find very little footſteps of proceeding in the lords houſe in caſes criminal: but people took their ordinary courſe at law; or if they reſorted to parliament, they began in the houſe of commons, and then it was tranſmitted by them to the lords, and it ended in a bill or act of parliament.

AND thoſe caſes above mentioned are the moſt that I find after 25. *E.* 3. which nevertheleſs appear for the moſt part to be, either in ſuch caſes where the houſe of lords as the *magnum conſilium regis* had juriſdiction by acts of parliament, as in great riots, falſe accuſations before themſelves; or where by the power and outrageous oppreſſion and violence of men of power the proceeding of the common law was obſtructed; and by the power of the lords houſe and their interpoſition that obſtruction removed, and ſuits remitted to their ordinary regular courſe in the ordinary courts of juſtice.

AND indeed in thoſe turbulent times there was great neceſſity and uſe of ſuch interpoſition of the lords houſe to preſerve the peace, and to afford the law its due courſe and current; and therefore in thoſe

acts of 1. *R.* 2. and 2. *R.* 2. above mentioned tacitly allowed even to the *conſilium ordinarium.*

AND hence it was, that when *rot. parl.* 2. *H.* 6. *n.* 16. the private council of that young prince was eſtabliſhed, and their power declared by act of parliament, it is ſpecially provided, that all bills before them, that contain matters terminable at common law, be remitted there to be determined; but if ſo be the diſcretion of the council feel too great might on the one ſide and unmight on the other, there they might diſcreetly interpoſe, that ſuits be fairly carried.

AND though poſſibly as well the lords houſe, as the king's council, by occaſion of theſe admiſſions and exceptions, might in ſome caſes exceed; yet neither the one nor the other took upon them an univerſal or common juriſdiction in criminal cauſes, but left them ordinarily to the ordinary courts of juſtice.

BUT in all caſes, where the evidence of the fact was not clear by the confeſſion of the parties or great notoriety of the fact, the party complained of might plead the general iſſue, and put himſelf upon the country. And then the complaint was either ſent into the king's bench to be tried, which was the uſual courſe; or ſpecial commiſſions of enquiry iſſued to try it by inqueſt; or (which was very rare) it was tried by a jury returned *coram rege et conſilio*, as was done in the caſe between Bartholomew Badleſmer conſtable of the caſtle of Briſtol and the mayor and commonalty of Briſtol; where the jury was returned *coram conſilio*, and found the defendants guilty, for which they made fine of two hundred marks, *rot. parl.* 9. *E.* 2. *n.* 7. which though it were a proceſs *coram conſilio*, yet it ſeems to be in the lords houſe in parliament, becauſe entered there of record; the only example of ſuch a trial in parliament, except that of 4. *E.* 3. of the lord Barclay abovementioned, and that of Alice Peres, *rot. parl.* 1. *R.* 2. who pleaded not guilty, and was tried by a kind of jury.

AND

AND thus much of criminal proceedings in the lords houſe. Wherein I meddle not with proceedings in caſes of breach of privilege, becauſe of another nature. Nor have I mentioned many caſes before 25. *E.* 3. in the times of *E.* 1. and ſome in the beginning of *E.* 3. becauſe before the ſtatutes of 5. 25. & 42. *E.* 3. which were made againſt proceedings without due preſentment. Nor have I mentioned the proceeding againſt Lee *rot. parl.* 42. *E.* 3. *n.* 21. 22. *&c.* that againſt Lyons the lord Latimer and others *rot. parl.* 50. *E.* 3. *n.* 17. 20. againſt Gomines and Weſton *rot. parl.* 1. *R.* 2. *n.* 38. that againſt the biſhop of Norwich, † *R.* 2; that againſt the dukes of Surrey and Aumerle marquis of Dorſet earl of Glouceſter and John Hall touching the murder of the duke of Glouceſter ‡: for he, that carefully looks into all parts of the records of theſe proceedings, will find them, either by the promotion or petition of the houſe of commons, or in purſuance of acts of parliament directing ; and therefore I do not mention them.

AND the like method of impeachments of the houſe of commons delivered into the lords houſe, againſt as well commoners as peers, hath been frequently uſed in latter times. Whereupon the lords took the defence or anſwer of the perſons impeached; received proofs; and upon a private debate among themſelves firſt had, agreed touching the cenſure whether guilty or not guilty; and if guilty, then proceeded to the particulars of their cenſure, and oftentimes acquainted the king with their ſentence. And when the lords were agreed of their judgment, they ſent to the houſe of commons to acquaint them they were ready for judgment. Whereupon the houſe of commons came up to the lords houſe with their ſpeaker, and demanded judgment againſt the perſons impeached; and the lords being in their robes, the chancellor or other ſpeaker of the lords houſe read and pronounced the judgment of the lords. This was the method uſed in the parliament 1620 in 18. *Jam.*

† *Rot. parl.* 7. *R.* 2. *n.* 15.—F. H. ‡ *Rot. parl.* 1. *H.* 4.—F. H.

againſt

againſt the lord chancellor Verulam, 20. *Martii* 1620. 3. *Maii* 1621. 4. *Maii* 1621. againſt ſir Thomas Michel; 4. *Maii* 1621. againſt Yelverton; 15. *Maii* 1621. againſt Flood, who was firſt cenſured by the houſe of commons, (whereof the lords complained as an intruſion upon their judicature) and then after a conference between both houſes cenſured by the lords, 5. *Maii* 1621. 25. *Maii* 1621. The like method of proceeding in all points in the parliament 21. *Jam.* as againſt the lord treaſurer, *viz.* the earl of Middleſex, as appears by the journal book of that parliament.

CHAP.

CHAP. XVII.

CONCERNING THE JURISDICTION OF THE HOUSE OF LORDS IN CIVIL CAUSES IN THE FIRST INSTANCE.

I COME to conſider the juriſdiction of the houſe of lords in civil cauſes by original petition or in the firſt inſtance.

THE exerciſe of juriſdiction in caſes of this nature is of two kinds.—I. By way of tranſmiſſion.—II. By way of deciſion or final determination.

I. As to the former of theſe, it is without queſtion, that the ſame was always exerciſed by the *conſilium regis* as well in parliament as out of parliament, and by the *magnum conſilium* in parliament, and by the houſe of lords when they aſſumed the judiciary power ſolely to themſelves.

AND this was nothing elſe but a remitting of petitions and petitioners to the king's ordinary courts; ſometimes generally; ſometimes ſpecially, with ſpecial direction either touching the proceſs or ſome circumſtances or directions of proceeding, whereby the ordinary courts were aſſiſted and proceeded to the final determination of cauſes: and was indeed rather an act of advice council and direction, than any deciſive or determining juriſdiction.

AND of ſuch kinds of directions both the antient and later parliament rolls and bundles of petitions are full; and it was and is unqueſtionably allowed to that houſe, and was of great uſe to the people.

II. As

II. As to the ſecond, the deciſive or determining juriſdiction, ſuch a juriſdiction as ended in a judicial ſentence or judgment and coercion or execution thereupon. And this is conſiderable under two reſpects or relations:—(1.) In ſuits, where the king's intereſt was concerned:—(2.) In ſuits or petitions between party and party.

(1.) TOUCHING the former of theſe, it is certain, that in many caſes the lords had juriſdiction to give a deciſive judgment. Such were caſes of petitions of right indorſed by the king to the houſe of lords; *monſtrans de droit*; ordering of *procedendo in loquelâ* or *ad judicium* upon *aid-pryer* or *rege inconſulto* upon diſcuſſion of the caſe, *ætate probandâ, idictâ examinando*, interpleading upon livery prayed. And hitherto may be referred many of the caſes *inter placita parliamenti Edwardi primi*, the pleas *coram magno conſilio rot. parl.* 8. *E.* 2. *m.* 1. & 2. for the hoſpitals of Thomas of Acon and North Allerton, *rot. parl.* 9. *E.* 2. *m.* 3. *dorſ.* the great plea for a livery by the ſiſters and coheirs of Gilbert of Clare earl of Glouceſter againſt the widow of the ſaid earl, who to obſtruct the livery alledged ſhe was with child; where, after many tranſactions at length *coram archiepiſcopo Cantuariæ, et aliis prælatis et comitibus et baronibus, cancellario, theſaurario, juſticiariis de utroque banco, cancellario et baronibus de ſcaccario, clericis de cancellariâ, et aliis de conſilio domini regis, ibidem recitatus fuit totus proceſſus; et quia apparet, quòd tantum temporis elapſum fuit à tempore mortis prædicti comitis, concordatum eſt, quòd cohæredes ad hæreditatem comitis admittantur.*

THE like was that great plea of the biſhop of Durham, *ibid. m.* 8. for royal eſcheats, and infinite more.

AND hitherto may be referred the caſes of titles of honour and precedence between the nobility; though regularly ſuch caſes come firſt to the king, and by reference from him to the lords. For theſe matters

matters of honour, whereof the lords are proper judges, ſuch were the caſes *rot. parl.* 11. *H.* 6. *n.* 32. for the earl of Arundel, where judgment is given for him by the king *de adviſamento et aſſenſu prælatorum ducum comitum et baronum in parliamento.*

But it is true *rot. parl.* 3. *H.* 6. *n.* 11. in the controverſy for precedence between the earls marſhal and Warwick it is judged by the king, *de aviſamento et aſſenſu dominorum ſpiritualium et temporalium, et communitatis regni, necnon juſticiariorum, ſervientium domini regis ad legem, et aliorum de conſilio,* that the earl marſhal as ſon and heir of the duke of Norfolk *nomine ſtilo et honore Norfolciæ gaudeat et utatur,* and ſo had precedence.

Rot. *parl.* 27. *H.* 6. *n.* 18. the caſe of precedence between the earls of Arundel and Devonſhire, and referred to the judges. They return their anſwer, that the caſe ought to be determined by the king and his lords, and not otherwiſe. Judgment given by the king by the advice and aſſent of the lords ſpiritual and temporal for the earl of Arundel to enjoy the place and precedence by reaſon of the caſtle and honour of Arundel. And of the ſame nature were the deciſions of the houſe of lords on the titles of the office of great chamberlain and earldom of Oxon in 3. *Car.* 1. and of the title of lord Gray de Ruthen in the beginning of the parliament of 16. *Car.* 1. by reference from the king to the houſe of lords.

(2.) But as to petitions between party and party concerning matters of private intereſt, how far the lords could or could not exerciſe a deciſive or judiciary determination in the firſt inſtance, hath of late been a great cauſe of contention.

To come therefore to ſome certainty in that caſe, we muſt ſuppoſe the matters, wherein relief is deſired by ſuch petitions, fall neceſſarily under one of theſe two heads, viz. First, Either they

are ſuch as are relievable in the ordinary courts of juſtice: Or, SECONDLY, They are not relievable in the ordinary courſe and courts of juſtice.

As to the FIRST of theſe caſes, it is certain, that the lords had no deciſive juriſdiction in ſuch caſes; but were only to indorſe the petitions with a remiſſion to the ordinary courſe and courts of juſtice.

THIS appears abundantly,

1. BY the conſtant declaration of the king and both houſes of parliament declaring their juriſdiction to extend only to ſuch caſes, *que ne purrent eſployt hors de parlement*, it would be too troubleſome to ſet down all the particular words of the declarations of parliament in ſuch caſes. Take theſe few inſtances, for many more that might be given, plainly expreſſing this aſſertion: *Rot. parl.* 28. *E.* 3. *n.* 3. 2. *H.* 4. *n.* 15. 4. *H.* 4. *n.* 23. & 24. 2. *H.* 5. *p.* 1. *n.* 5. *p.* 2. *n.* 4.

2. BY the aſſignation of triers of petitions in parliament, whoſe office it was to garble the parliamentary petitions, and to diſmiſs as they found remediable or determinable in the ordinary courts of juſtice to their proper judicatures.

3. BY the conſtant form of the indorſements of parliamentary petitions determinable by the ordinary courts of juſtice, remitting them to their ordinary courts, viz. *ſequatur ad communem legem*; *ſequatur in cancellariâ per breve originale*; *habeat breve formatum in cancellariâ ſuper caſum*; and many more to the ſame effect, the numbers whereof were almoſt infinite both in the parliament rolls and bundles of parliamentary petitions.

4. BY

4. By the judgments of the lords themſelves in parliament. Amongſt many that might be inſtanced, I ſhall only mention two or three; which, being given by themſelves in diſaffirmance of their own juriſdiction, are of more weight and value than a whole cart-load of inſtances of private cauſes heard and determined by them in the firſt inſtance, where poſſibly the defendant durſt not or did not plead or except to their juriſdiction.

Rot. *parl.* 18. *E.* 1. Ryley p. 33. 35. The biſhop of Winton being queſtioned in parliament at the ſuit of the king and his mother touching the patronage of the hoſpital of St. Julian's in Southampton, he pleads, that he found his church ſeiſed thereof, and demands judgment, *ſi debeat ſine breve domini regis inde reſpondere.* Judgment thereupon given, *ideo quoad hoc ſine die ad præſens; et dominus rex habeat breve verſus ipſum, quòd reddat ei advocationem; et quoad ejectionem cuſtodis inquiratur veritas per patriam.*

Parl. 18. *E.* 1. Ryley 43. upon a ſuit in parliament between Adam claiming the lands of Henry Edelingthorp as his ſon and heir againſt Hugh Lowther, Hugh pleads, that *idem Adam actionem ſuam (ſi quam habere debeat) per aſſiſam mortis anteceſſoris per legem communem in caſu conſimili habere poſſit et ſuum jus recuperare, & petit judicium, ſi de libero tenemento ſuo debeat hic reſpondere ſine brevi; et quia actio de prædicto tenemento petendo et etiam recuperare ſuum, ſi quid habere debeat vel poſſit, eidem Adamo per aſſiſam mortis anteceſſoris competere debet,* NEC EST JURI CONSONUM VEL HACTENUS IN CURIA ILLA USITATUM, QUOD ALIQUIS SINE LEGE COMMUNI ET BREVI DE CANCELLARIA DE LIBERO TENEMENTO SUO RESPONDEAT, ET MAXIME IN CASU UBI BREVE DE CANCELLARIA LOCUM HABERE POSSIT: *Dictum eſt eidem Adamo, quòd ſibi perquirat per breve de cancellariâ, ſi ſibi videret expedire.*

Rot. *parl.* 13. *R.* 2. *n.* 10. in the caſe of Adam de Changeor, an original petition was preferred to the lords touching the forfeiture of a

mortgage. The cauſe was heard, and the lords gave this judgment: *Il ſemble al ſeigneurs, que la dite petition n'eſt petition de parlement, eins que la matire en icel compriſe deuſt eſtre diſcus par la commune ley; et pur ceo agard feuſt, que le dit Robert irroit ent ſans jour, et que le dit Adam ne prendroit riens par ſa ſuit, eins qu'il ſueroit par le commun ley, ſi lui ſembleroit a faire.*

NOTA 1. there was matter of great equity in the caſe; for though the money were not, it may be, paid preciſely at the day; yet all or the greateſt part thereof was ſatisfied.—2. Note the judgment is not barely a piece of kindneſs of the lords. The words are *deuſt eſtre diſcus par la commune ley*, and not in parliament, for that very cauſe.

5. BY the acts of parliament of 5. *E.* 3. 25. *E.* 3. 28. *E.* 3. 42. *E.* 3. no man ſhall be put to anſwer touching his freehold without original writ and due proceſs of law, which indeed is no other but in affirmance of the common law of the land.

So that upon the whole matter it is apparent, that for matters remediable in the ordinary courts remedy ought not to be given in the lords houſe; and indeed it is againſt all reaſon it ſhould invert the whole œconomy of the laws of England, as is ſhewn *ſupra* CHAP. XV.

IN the SECOND place therefore I come to conſider of caſes not relievable in the ordinary courſe of juſtice in the king's ordinary courts, and how far forth the houſe of lords hath juriſdiction or judiciary deciſion and coercion in ſuch caſes.

AND touching theſe there will be this diverſity, which will be applicable to this inquiry:—1. Some caſes may not be relievable in the king's ordinary courts; becauſe in truth there is no law already eſtabliſhed

eſtabliſhed for their relief, though it may be juſt and reaſonable, that a law ſhould be provided for the caſe or caſes of like nature.—2. Some caſes are not relievable in the ordinary courts of juſtice, by reaſon of ſome collateral impediment or accident, that obſtructs the relief in the ordinary courts, though the law itſelf be more defective therein.

1. As to the former of theſe it is certain, the houſe of lords hath no juriſdiction or power of relief in ſuch caſes; for that were to give up the whole legiſlative power unto the houſe of lords. For it is all one to make a law and to have an authoritative power to judge according to that, which the judge thinks fit ſhould be law, though in truth there be no law extant for it. In ſuch caſes therefore the whole parliament is to be reſorted to, either to make a new general law which may comprehend the caſe in queſtion, or to give particular relief to the caſe by the full legiſlative power and by act of parliament.

AND that this is ſo appears abundantly by the inſtances hereafter given, and many more that might be given in the caſe.

ROT. *parl.* 14. *E.* 2. Ryley 409. *Ad petitionem Martini Chamberlan* to have a manor held of him by the Templars now diſſolved, *ita reſponſum eſt*, NON EST LEX ORDINATA.

TEMPORE *E.* 3. Ryley 653. At the petition of John Kirbrooke to have remedy for waſte committed by tenant in tail after poſſibility, *dorſo*, LEY N'EST MY UNCOR ORDEIN EN CE CASE.

PETIT. *parl.* 8. *E.* 3. *n.* 44. At the petition of Lucas Burgh the king's attorney praying an exigent upon a judgment in attaint affirmed in the king's bench againſt ſir Ralph Camoys, *reſponſ.*

IL SEMBLE A COUNCELL QUE L'EXIGENT NE POIT ESTRE AGARD EN CET CASE SI CEO NE SOIT ORDEINE PAR NOVEL LEY.

ROT. *parl.* 8. *E.* 2. *m.** . *dorſ.* Joan de Borreſden petitioned, that ſhe might be barred by the collateral warranty of her mother without aſſets. The *conſilium ordinarium* thought it to be within the reaſon of the ſtatute of Glouceſter, which takes away the bar by the warranty of the father unleſs aſſets deſcend, and therefore anſwered accordingly. But this anſwer being recited *coram magno conſilio* was diſallowed. *Et quia iſta petitio non poteſt finaliter expediri* SINE EXPLANATIONE STATUTI PRÆDICTI, *ideo oſtendatur coram* MAJORIBUS, *et fiat inde explanatio.* And certainly that, which was meant by MAJORIBUS, was intended of the whole parliament to provide an explanatory act.

ROT. *parl.* . *E.* 3. . upon a petition for the owners to improve waſtes in foreſts, the anſwer was, *Ceo ne poet eſtre fait* SANS NOVEL LEY, *a que les communes ne ſont uncor adviſe d'aſſenter.*

BUNDELL. *petition.* 8. *E.* 3. *n.* 41. upon the petition of John de Roges deſiring to be diſcharged of a ſtatute merchant extorted from him by his guardian during his minority, RESPONS. *S'il ſoit uncor deins age, il ad ſa ſuit devant le roy*; *et* S'IL SOIT DE PLEINE AGE, L'AVERMENT NE MY GIST.

BY theſe and the like inſtances it is apparent, the caſes not relievable by the law were not relievable in the lords houſe in parliament, if the unrelievableneſs were for want of a law to relieve them.

AND therefore during the ſitting of this parliament †, when the

* 8. & 9. *E.* 2. *n.* 3.——F. H.

† Lord Hale means the ſecond parliament of *Cha.* 2. which began 8 May 1661, and was not diſſolved till above ſeventeen years afterwards, namely, till 24 Jan. 1688-9. ——F. H.

coheirs

coheirs of Vantore petitioned againſt a fine obtained from the lady Powell by a great force uſed upon her and by fraudulent contrivances of a very high nature; yet they could not have relief in that way, but were conſtrained to avoid it by an act of parliament*; and yet not without great difficulty, notwithſtanding the caſe of *E.* 1. where a fine was avoided by reaſon of the fraud of an attorney inſerting more lands than were intended.

AND hence it was, that although it was notorious, that the Spencers by their great power and favour in the time of *E.* 2. had obtained fines and recognizances of great value, there was a ſpecial act of parliament *anno* 1. *E.* 3. *cap.* 1. to avoid theſe fines and recognizances, which could not otherwiſe have been avoided, no not by a judgment of the lords houſe.

2. THEREFORE we are to reſort to the ſecond kind of unrelievableneſs of caſes, wherein yet there was relief to be had in the lords houſe in parliament; namely, when it was by reaſon of ſome collateral obſtruction that hindered the relief.

AND this was principally in theſe caſes.—1. When the king's intereſt was concerned, who could not by law be ſued as a common perſon might, but it muſt be by petition, as in caſes of petitions of right, *monſtrans* of right, aid prayed of the king, ſuits for livery, and the like; all which, though many of them might be proceeded upon in chancery, yet were frequently begun and many times concluded, ſometimes before the *conſilium ordinarium*, ſometimes in the lords houſe in parliament.—2. Where the party defendant was ſo potent, and his practices ſo turbulent, that the ordinary courſe of juſtice was obſtructed, as by riots, maintenance, &c. whereof before CHAP. † . in which caſes the lords did oftentimes interpoſe their

* See private acts of 13. and 14. *Cha.* 2. *chap.* 27.——F. H.

† CHAP. XVI. See before p. 96. to 100.——F. H.

authority

authority to remove ſuch obſtructions and to give the ordinary courſe of law its current; and they had the countenance of parliamentary acts of conceſſions for ſo doing, as is before ſhewn CHAP. * .— 3. In the caſe of corruption or bribery of the judges, that were to determine cauſes, or when they unduly made uſe of their own power place and authority in caſes of their own intereſt, of which we have had formerly inſtances.

THESE were the caſes for the moſt part, wherein the lords deciſive juriſdiction was exerciſed; becauſe no relief could be ordinarily had otherways; and this is accordingly ſo expounded by thoſe acts or parliamentary deliberations in 1. & 2. *R.* 2. mentioned in the former Chapters.

* CHAP. XVI. p. 96. 99. 100.——F. H.

CHAP.

CHAP. XVIII.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN THE SECOND INSTANCE, VIZ. IN CAUSES ORIGINALLY BEGUN IN OTHER COURTS: AND FIRST OF VOLUNTARY ADJOURNMENTS.

I COME now to conſider of the juriſdiction of the lords houſe in the ſecond inſtance; namely, in cauſes originally begun in other courts.

AND this is in two kinds:—1. in relation to pleas or ſuits depending and not determined in the courts below:—or 2. concerning ſuits determined by judgment.

THE firſt I call pleas removed by way of adjournment. The ſecond is in caſes of writs or petitions of errors or appeals.

As touching adjournments, they are of two kinds, viz. 1. Such as are voluntarily made by the courts below themſelves in caſes of doubt or difficulty. 2. Where it is done by the precept or order of the court of parliament or lords houſe or by the king's writ.

CONCERNING voluntary adjournments of matter into the lords houſe, it was frequently done, 1. in caſes of great difficulty; 2. in caſes of great weight, moment, or concernment: both which were ſometimes of the whole cauſe to receive its determination there, ſometimes only of ſome particular point or queſtion.

AND this was oftentimes of great uſe to the ordinary courts of juſtice; for here was a kind of concentration of the men of greateſt learning in the laws, as the chancellor, juſtices, king's ſerjeants, maſters of chancery, and other of the king's *conſilium ordinarium*; and beſides this there was the reputation and authority of the nobility and clergy.

THUS in 40. *E.* 3. 34*. the judges adviſed with the lords in parliament touching the conſtruction of the ſtatute of amendments. And thus it was frequent for whole cauſes to be thus adjourned into the lords houſe. *P.* 4. *E.* 1. *rot.* . *coram rege*, *T.* 15. *E.* 1. *ibid. rot.* . *T.* 31. *E.* 1. *rot.* 34. *ibid. P.* 9. *E.* 2. *ibid. rot.* 112. *rot. parl.* 9. *H.* 5. *p.* 2. *n.* 11. 12. touching a prohibition iſſuing out of chancery.

SOMETIMES the cauſes were of that moment, that they could not well be ſettled without the joint advice of both houſes, who were thereupon called together. Such an inſtance we ſhall in the next Chapter meet with, 14. *E.* 3. Staunton's caſe.

AND this courſe of adjournment, eſpecially for advice, into the parliament is no other but what is directed by the ſtatute of Weſtminſter 2. *cap.* 24. *Scribant caſus, in quibus concordare non poſſunt; et referant eos ad proximum parliamentum.* And the like direction in effect is given by the ſtatute of 14. *E.* 3. in caſes of delays of judgment by reaſon of diverſity of opinion difficulty or weight, whereof hereafter.

BUT this courſe hath not been much of uſe in latter ages, by reaſon of the delay it gave in proceedings and the intervention of public buſineſs. But in caſes of difficulty in latter ages adjournment of cauſes into the exchequer chamber for advice hath ſupplied in a great meaſure theſe difficulties.

* *Vid. M.* 40. *E.* 3. *placito* 39.

CHAP.

CHAP. XIX.

CONCERNING THE REMOVAL OF RECORDS INTO PARLIAMENT BEFORE JUDGMENT BY THE KING'S WRIT OR COMMAND OF THE LORDS, AND ANTICIPATION OF JUDGMENTS BY THEM IN INFERIOR COURTS.

IT is regularly true, that antiently the lords in parliament did ſometimes upon complaint of delays of proceeding in judgment in the ordinary courts of juſtice, either by reaſon of difficulty or ſome other matter, indorſe petitions with advice and remembrance to the ſubordinate judges to give all due expedition to buſineſſes ſo depending. Yea and many times before the ſtatute of 1. *E.* 3. *cap.* 8. ſometimes by order of the lords, ſometimes by the king's writ under the great or privy ſeal, upon petitions in parliament, records were removed out of the courts below into parliament before judgment, which were for the moſt part remanded again without any thing done thereupon. *Vid. Paſch.* 33. *E.* 3. *B. R. rot.* 5. Vantort's caſe, *T.* 31. *E.* 1. *B. R. rot.* 34. Montford's caſe, and divers others in thoſe elder times. But theſe mandates tending to the delay of juſtice were afterwards diſuſed, eſpecially by reaſon of the ſtatute of 1. *E.* 3. *cap.* 8.

BUT it was neither uſual nor regular for them, at any time before judgment given in the courts below, to remove the records before themſelves or before the council to direct what judgment ſhould be given in the courts below, and ſo *per ſaltum* anticipate the deliberation and reſolution of the ordinary courts, unleſs in two caſes:—1. When it was deſired by the courts below for their own ſatisfaction in caſes of weight or difficulty, as in the precedent Chapter:—Or 2. in the ordinary courſe of an aid-prayer of the king in the courts below, or in iſſuing a writ of *rege inconſulto* where the king's intereſt

was concerned.—Such anticipations as theſe, as they iſſued out of chancery ordinarily, ſo ſometimes in caſes of weight it was done by the king's mandate or the command of the lords in parliament. But this being but in nature of an ordinary proceſs, I ſhall not further enlarge upon it.

AND that the anticipation of judgments in this manner by the lords was neither uſual nor regular, *vide rot. parl.* 8. *E.* 2. *m.* 18. Upon the petition of Thomas Hobledon, praying that a record depending by writ of error in the king's bench might be removed *in pleuum parliamentum*, becauſe it had been long delayed; the anſwer was, *Sequatur placitum coram rege quouſque revocatum vel affirmatum fuerit*, with a monition only to the judges to proceed to judgment *cum eâ celeritate quâ fieri poteſt ſecundum legem et conſuetudinem regni.* And to the very like effect a like anſwer is given upon the like petition, *bundell. petition.* 8. *E.* 3. *n.* 14.

FOR it is an unreaſonable thing upon the haſtineſs of a ſuitor to deny the ordinary courts of juſtice their due time of deliberation, or to ſuppoſe before-hand that they will not do what is agreeable to law in cauſes depending before them.

YET I do confeſs, that ſometimes the importunity of petitioners to the lords have put them upon ſuch anticipation, but rarely with any ſucceſs, but delay and inconvenience to ſuitors.

AND this anticipation was ſometimes by writ under the great or privy ſeal, ſometimes by order of the lords.

BUT by the ſtatute of 1. *E.* 3. *cap.* 8. whereby it is enacted, that notwithſtanding commands under the great or privy ſeal the juſtices proceed to do right in their courts, the commands of this nature grew rare,

rare, and when they came were rarely obeyed, as tending to delay of juſtice.

THE caſe of ſir Geoffry Stanton was upon a counterplea of a voucher, whether continuance of ſeiſin might be averred by a ſtranger againſt a fine, *quod vide* 13. *E.* 3. *Voucher* 119. There was diverſity of opinion among the judges, which gave ſome delay to the demandant. Upon the complaint to the king and lords by ſir Geoffry, the record was ſent for into the lords houſe in parliament. *Rot. parl.* 14. *E.* 3. * And upon this petition the anſwer was, *Aviſe eſt au counſeil, que par le ley de terre Geffry Stanton, q'eſt eſtrange al fyne, eſt receivable al averment q'il a tend, pur ceo q'il n'eſt ouſte de cel averment par le ſtatut ne par autre ley, pur que la court doit aler al judgment ſelonc ce, &c.* And thereupon a writ under the great ſeal bearing teſt 22. May 14. *E.* 3. to the juſtices of the common pleas to give judgment accordingly *ſelonc l'adviſe et agard avant dit.* But the judges notwithſtanding forbore to give judgment; and thereupon an *alias*; and that not being obeyed a mandate iſſued to the ſame effect under the privy ſeal *teſte* 17. *Junii* 14. *E.* 3. † But nothing was done by the judges thereupon; for they took not themſelves bound by ſuch anticipation or mandates. And thereupon he complained again. And the petition and tranſcript of the record being read *en plein parlement, aſſentu eſt par touts en plein parlement, et commaund par les prelates countes barons et autres du parlement, a ſir Thomas Drayton, clerk de parlement, q'il alera al juſtices de G. B. et leur dirent q'ils aillent a judgment ſelonc le plea plede devant eux ſans pluis delay; et s'ils ne puiſſent accorder pur difficulty, &c. q'ils veignent et apportent le roll et record en parlement illoeques a prender finall accord quel judgement ſe dever faire.* The chief juſtice accordingly brought in the record *en parlement; et aſſembles illoeques le chauncellor, treaſurer, juſtices del un banck*

* No. 31.—F. H.

† I do not perceive that the printed rolls of parliament include the ſubſequent proceedings in parliament on this caſe of ſir Geoffry Stanton. But ſee Cott. Abr. of Parl. Rec. 130.—F. H.

et

et del autre, barons d'exchequer, et autres de councell le roy, et en dit parlement veues et lyes le record, et en dit parlement debatus diligentment et examine. En meme parlement eſt finalment accord, that ſir Geoffry is receivable to the averment, and ought to recover ſeiſin, *par quoi en le dit parlement etoit dit al juſtices, q'ils aillent a render judgement.* [Note, till a judgment *en plein parlement* the judges would not obey the direction.] And accordingly now the judges gave judgment for the demandant, upon which judgment nevertheleſs the tenant brought a writ of error in the king's bench, *Hil.* 15. *E.* 3. *B. R. rot.* 41. *Nott.* where the matter depended long; and afterwards the plaintiff in the writ of error was nonſuit.

UPON this record theſe things are very obſervable.—1. That the judges, who are upon their oath, did not take themſelves bound by a direction of anticipation, given by the lords, approved by the *conſilium regis,* and followed with the king's writs or mandates of the great and privy ſeal, to give judgment according to this direction.—2. But when the *plenum parliamentum* conſented thereunto, then and not before they ſubmitted to it.—3. Even the *plenum parliamentum* would not govern their directions by their own judgments; but herein they firſt took the advice of the king's *conſilium legale* or *ordinarium,* the chancellor, juſtices, &c.—4. That though this judgment was given by the advice and command of both houſes of parliament and of the *conſilium regis,* yet a writ of error lay upon that judgment; for though it were a parliamentary advice expounding the law, yet it was not an act of parliament authoritatively declaring the law, for then it had been concluſive to all courts.

THIS proceeding upon Stanton's petition, and the delays and difficulties that it produced, were the occaſion of the ſtatute of 14. *E.* 3. *cap.* 5. whereby a commiſſionary court is erected, conſiſting of two biſhops, two earls, two barons, and the chancellor treaſurer and juſtices, for the remedy of delays in courts of juſtice: upon which

which theſe things are obſervable, and will be of uſe in the enſuing diſcourſe.

1. THE firſt biſhops earls and barons are named in the act; and it being an act of parliament, the nomination, or which was equivalent the conſent to theſe perſons, muſt be by the king and both houſes.

2. THAT afterwards the perſons, viz. biſhops earls and barons, were to be named by the king, and commiſſionated by a ſpecial commiſſion under the great ſeal to this employment. And indeed it is regularly true, that very oftentimes, though acts of parliament ſettle a juriſdiction; yet the exerciſe thereof is regularly to be by the king's commiſſion. *Vid.* 9. *H.* 6. 19. in the caſe of the mayor of the ſtaple.

3. THAT the deciſive power by this act ſeems to be committed as well to the judges as to thoſe lords; and they had a voice therein not only of advice, but alſo of ſuffrage. And this hath been the wiſdom of parliament in all ages; to be much, if not wholly, guided by the judges and thoſe that are knowing in the laws of the land, when matters of that kind were in debate.

4. THAT in caſe they could not conclude, then they were to ſend the tenor of the record to the next parliament there to be finally reſolved, and according to that reſolution the judges to give their judgment. The words in this act *aſſent of parliament* ſeem to take in the aſſent of both houſes or *plenum parliamentum*; for as the words *aſſent of parliament* import as much, ſo it purſues the methods uſed in Stanton's caſe, where the direction for the judgment is by the aſſent of the *plenum parliamentum.*

THIS court was uſed in 14. *E.* 3. after this act till the next parliament; and ſince commiſſions have been ſometimes granted under the

the great ſeal, which are grounded upon this act, and run to this effect, *aſſignavimus vos de aſſenſu parliamenti.* Such were thoſe of *rot. pat.* 18. *E.* 3. *m.* . *& pat.* 9. *R.* 2. *m.* 31. *dorſ.* for Thomas Lovell. But otherwiſe ſuch commiſſions have been rarely if at all granted: and the court itſelf is thereby worn out of uſe.

And this ſtatute of 14. *E.* 3. is that mentioned *rot. parl.* 1. *R.* 2. *n.* 95. 2. *R.* 2. *n.* 63.

CHAP.

CHAP. XX.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN CAUSES IN THE SECOND INSTANCE, VIZ. AFTER JUDGMENT GIVEN IN THE ORDINARY COURTS, VIZ. WRITS OF ERROR AND APPEALS.

I NOW come to what I principally aimed at in this whole diſcourſe, viz. concerning the juriſdiction of the lords houſe in caſes of the ſecond inſtance by writs or petitions of error and appeals after judgment.

AND this will concern two ſorts of ſuits or proceedings in the ordinary courts, viz.—FIRST, upon judgments given in courts of law, where the ordinary remedy is by writ or petition in nature of a writ of error:—SECONDLY, upon decrees in courts of equity, namely, in the chancery.

I SHALL firſt diſpatch the former of theſe, and conclude with the buſineſs of appeals from decrees in equity.

IN the full examination of the former of theſe, namely, writs or petitions of error, I ſhall, as near as I can, hold this method.

1. OUT of what courts, records or judgments are or may be removed into the parliament for error.

2. INTO what court they are or may be removed, viz. whether into the full parliament, there to be determined, or into the lords houſe.

3. WHAT is preliminary and requiſite in law preliminary to the removing of records into parliament for error.

4. BY what method the ſame is to be done, whether by petition or writ.

5. How and when and in what manner the record is to be brought into parliament, and the errors are to be aſſigned.

6. WHAT proceſs is to be made againſt the defendant in ſuch writ or petition of error, and where and how to be returnable.

7. How and by whom the judgment of affirmation or reverſal is to be given, whether by the lords and commons, or whether by all the lords, or whether only by ſome, and by what advice and order they are to proceed.

8. How the judgment of affirmation or reverſal is to be executed.

9. WHAT is the effect of a prorogation or adjournment of the parliament before the final judgment of affirmation or reverſal be given.

10. AFTER this I ſhall conſider of appeals touching decrees in courts of equity.

CHAP.

CHAP. XXI.

OUT OF WHAT COURTS RECORDS MAY BE REMOVED FOR ERROR, AND WHEN.

REGULARLY when a judgment is given in ſuch a court, as hath no court immediately ſuperior to it, where its errors in judgment may according to the common law of the land be examined, but the parliament, there a writ or bill of error lies in parliament. But if by the conſtitution of the common law, it have another ſuperior court, wherein its errors may be examined, it is not to go *per ſaltum* into parliament by writ or petition of error. Particular inſtances will make the learning hereof more plain.

1. As to the parliament itſelf, if a judgment be given (ſuppoſe of attainder or of reverſal or affirmance of a judgment) by full parliament, viz. by the aſſent of the king and both houſes of parliament, this indeed may be reverſed *in pleno parliamento*; but cannot be reverſed or proceeded upon by way of error in the lords houſe alone.

THIS was the caſe of Richard Arundell, *rot. parl.* 4. *E.* 3. *n.* 13. who petitioned the king and his council in parliament (which was plainly the *upper* houſe of parliament) for the reverſal of the judgment of attainder given againſt his father; but could not be admitted, becauſe the judgment againſt his father *feuſt affirme en parlement*.

BUT if a judgment of attainder or affirmation or reverſal be given in the lords houſe in parliament, a writ of petition of error lies at another ſeſſion in the ſame lords houſe to reverſe their own judgment; and poſſibly it may be done even the ſame ſeſſion. Many

inſtances of this nature are; as in the caſe of Alice Peres, of Holt and Burgh, of the earl of Saliſbury and others; for which ſee *rot. parl.* 2. *R.* 2. *p.* 2. *n.* 36. 37. 7. *R.* 2. *p.* 2. *n.* 20. 8. *R.* 2. *n.* 11. 2. *H.* 5. *p* 1. *n.* 13. *p.* 2. *n.* 11. 3. *H.* 5. *p.* 1. *n.* 18. 9. *H.* 5. *n.* 19.

2. If a judgment be given in the king's bench in Ireland, it is true a writ of error lies into the king's bench of England or in the parliament of Ireland; and if the judgment be affirmed or reverſed in the parliament of Ireland, no writ of error lies in the king's bench of England upon ſuch affirmance or reverſal in the parliament there, but a writ of error lies in the parliament here upon ſuch judgment given in the lords houſe of parliament in Ireland. *Rot. parl.* 8. *H.* 6. *n.* 70. the caſe of the prior of Lanthony.

3. If a judgment be given in the chancery of England upon a *ſcire facias*, upon a recognizance, or in caſe of a ſuit by privilege, error lies in the king's bench; and therefore a writ of error lies not in the lords houſe in parliament, for then it would proceed *per ſaltum*. *Vid. Dy.* 315. 18. *E.* 3. 25. *Error* 71.

But if an erroneous judgment be given in a partition, or in a traverſe or *monſtrans de droit* or petition of right, a writ of error lies immediately into parliament; becauſe theſe are in truth *placita coram conſilio regis*, whereunto the juſtices of both benches are to be called and to give their opinions; and it is not reaſonable for them to be judges in the writ of error, where they are in effect judges in the firſt inſtance. And thus I knew it ruled in the caſe of a judgment given in chancery for the king againſt Squibb upon an *aid-pryer* and *rege inconſulto* about 20. *Car.* 2. And with this agree in caſes of like nature 42. *Aſſ.* . and *rot. parl.* 2. *H.* 4. *n.* 37. 38. 39. in Baſſet's caſe in caſe of a livery.

If

If a judgment be given in the king's bench, a writ of error lies in parliament. Nay, although it be in ſuch a ſuit wherein by the ſtat. of 27. *Eliz.* he may have a writ of error in the exchequer chamber; yet he hath election to bring it in parliament if he pleaſe. But if he once make his election to bring it in the exchequer chamber, it ſeems he has concluded himſelf, and ſhall not waive it and bring a writ of error in parliament, but at beſt, if he do it, it ſhall be no *ſuperſedeas*.

If a judgment be given in the king's bench in Ireland in an *ejectione firmæ* for the complainant, and that judgment is affirmed in the king's bench of England or reverſed, a writ of error lies in the lords houſe in parliament upon that judgment given in the king's bench here. And note, that a mandate ſhall iſſue out of chancery by writ by command of the lords in parliament unto the chief juſtice of Ireland to iſſue a writ in nature of a *ſcire facias* againſt the defendants *ad audiendos errores* in the parliament of England directed to the ſheriff of the county in Ireland where the land lies. And thus it was done in the parliament of 18. *Jac. per ordinationem* 25. *Maii* 1621. in Stafford's caſe.

4. A judgment given in the exchequer is not reverſible by error in the king's bench; but was antiently done *either* * by the king's ſpecial commiſſion *rot. parl.* 21. *E.* 3. *n.* 26. *et rot. parl.* 22. *E.* 3. *n.* 25.

But yet a writ of error did lie in parliament in ſuch caſes, as it ſeems; for the commiſſions were but in nature of acts of favour. *Vide* accordingly *H.* 2. *E.* 3. *coram rege rot.* 96. in the caſe of the men of Lementon, where upon ſuch a writ of error in parliament

* The word *either* is in the original. But unleſs this was by miſtake, which is probable, the ſenſe is imperfect, and there muſt have been an omiſſion; for in the following part of the ſame ſentence, only one mode of reverſing errors of the exchequer is mentioned.—F. H.

the

the examination of the error was committed to the juſtices of the king's bench. And it ſeems alſo, that, notwithſtanding the ſtatute of 37.* *E.* 3. that gives power to the chancellor and treaſurer to examine and reform errors in judgment *in ſcaccario*, a writ of error may lie in parliament, as well as in the inſtance above given touching the king's bench. *Quære tamen*, for I have not known it done.

5. If a judgment of affirmation or reverſal be given before the commiſſioners in a writ of error out of the huſtings of London in an action, it hath been ruled, that a writ of error lies upon ſuch a judgment in parliament. And accordingly it was done in a judgment of reverſal by ſuch commiſſioners in an action of waſte by Coke againſt Forth; and the judgment of reverſal ſo given was affirmed in the lords houſe, and the tenor of the record removed by *certiorari* into chancery, and thence ſent by *mittimus* into the king's bench, upon which a *ſcire facias* there iſſued, and execution thereupon awarded about 20. *Car.* 2.

6. If a judgment be given before juſtices of aſſiſe, oyer and terminer, or in eyre, or in the court of common bench, no writ of error lies immediately from thence into parliament, till the judgment be affirmed or reverſed in the king's bench; and then upon that judgment ſo affirmed or reverſed, a writ of error lies in parliament: for the writ of error muſt not be brought in parliament *per ſaltum*, but after it hath paſſed the ordinary way and method of examination in the king's bench. And accordingly it hath been ruled in parliament. *Rot. parl.* 8. *E.* 2. *n.* 18. & 50. *E.* 3. *n.* 48. the biſhop of Wincheſter his caſe.

* It ſhould be 31.—F. H.

CHAP.

CHAP. XXII.

CONCERNING THE COURT OF PARLIAMENT, WHEREIN RECORDS WERE REMOVED EXAMINED AND DETERMINED BY WRITS OR PETITIONS OF ERROR.

I HAVE before ſhewn the difference, between the *plenum parliamentum* (conſiſting of the king and both houſes of parliament, and ſometimes applied to both houſes only) and the *curia parliamenti*, *curia in parliamento coram nobis*, and *conſilio noſtro in parliamento*, *&c.* which are oftentimes intended of the upper houſe of parliament, as well as *coram prælatis proceribus et magnatibus in parliamento.*

ACCORDING to this diſtribution we ſhall find, eſpecially in antient records, two kinds of courts (if I may ſo call them) wherein errors were examined, viz. errors *in pleno parliamento*, and errors examined in the lords houſe.

TOUCHING examinations of errors *in pleno parliamento*, and the deciſion thereof by conſent of both houſes, this I call an extraordinary way; becauſe of latter ages much diſuſed. The other I call ordinary; becauſe it is that method of examining errors in parliament, that now is and for ſome ages laſt paſt hath been moſt if not altogether in uſe.

TOUCHING the former, there are many antient inſtances, where, upon petition of parties unduly attaint or their heirs, the records of the attainders were brought *in plenum parliamentum*, and errors aſſigned and judgments thereupon reverſed.

CLAUS. 1. *E.* 3. *parte* 1. *m.* 21. *dorſ.* The earl of Lancaſter, being condemned for treaſon by a kind of military council without being duly arraigned, petitioned in parliament 1. *E.* 3. for the reverſal thereof; and the record is brought into parliament, and errors aſſigned, and the attainder reverſed *per dominum regem proceres et magnates et totam communitatem in parliamento*, and his poſſeſſions reſtored. This was in the parliament of 1. *E.* 3.

CLAUS. 3. *E.* 3. *parte* 1. *m.* 33. the likė was done in the ſame parliament by the king lords and commons for the reverſal of the attainder of the biſhop of Hereford.

THE like was done for the biſhop of Carliſle, and for Roger Mortimer, in the parliament of 1. *E.* 3. upon the like attainders.

YET obſerve, that in theſe caſes the petition, upon which theſe records were entered, is exhibited *coram domino rege proceribus et magnatibus regni et conſilio ipſius domini regis*; and the ſtile of the roll of the record of reverſal is *placita coram domino rege et conſilio ſuo in præſentiá ipſius regis procerum et magnatum in parliamento:* yet the judgment given as well by the *commonalty* as the king and lords.

MORTIMER earl of March was condemned for treaſon touching the death of *E.* 2. by the judgment of the lords in parliament 4. *E.* 3. Eſmon his ſon and heir petitions the king, that the record of his father's attainder *ſoit fait vener devant vous et les peres de la terre*, that the errors therein may be examined and corrected and right done. *Rot. parl.* 28. *E.* 3. *n.* 8. *par vertu de quel petition le roy fiſt vener, devant lui, et le prince, et duc de Lancaſter, prelates, countes, barons, et peres de la terre,* LES CHIVALERS DES COUNTES ET TOTES LES AUTRES COMMONS, *le record et judgment,* which is there entered. He aſſigns errors, and principally in this, that he was judged to death without being arraigned or put to anſwer, *et ſur ce, eue bone deliberation*

tion par le roy prince duc prelats countes barons, il appeirt clerment, que judgment eſt erronious ; par quoi le roy, prince, duc, prelats, et peres, par ACCORD DES CHIVALERS DES COUNTEES ET DES DITS COMMONS, *repellent et pur erronious adjudgent le record et judgment ſuſdits, et agard ent reſtitution.* And the tenor of the record is ſent into the king's bench to award *ſcire facias* and execution.

ROT. *parl.* 28. *E.* 3. *n.* 13. Richard earl of Arundel by his petition to the king prays, that a ſtatute made 1. *E.* 3. which only recites his father's attainder *ſoit veue et examine devant lui et les paires de la terre,* and that he be reſtored to his father's lands. The king cauſed the record of that attainder to be ſearched; and nothing was found hereof, but that recital, and it is there entered, *quel ſtatute veue et entendue par noſtre ſeigneur le roy prelats prince de Gales duc de Lancaſter barons et paires de la terre et* CHIVALERS DES COUNTEES ET TOUTS AUTRES COMMONS *illonques aſſembles, le dit Richard dit, &c. que, &c. riens eſt compriſe forſque recitall de ſtatute, &c.* and *ſur ce eue bone deliberation par noſtre ſeigneur le roy prelats prince duc countes et barons avant dits, il appeirt, que Eſmon comte de Arundell fut unduement miſe a mort, pur quoi noſtre ſeigneur le roy prelats prince duc countes et barons, par aſſent des* CHIVALERS DES COUNTEES *et* DES COMMONS, *adjugent, &c. la recitation, &c. erroignes et nuls, et qu'il ſoit reſtore, &c. Nota,* the petition is to the king to bring the record before him and the peers in both theſe caſes. Yet the record is peruſed in both theſe caſes by both houſes. But yet the ſtile of the judgment varies from what it was before in 1. *E.* 3. for the judgment is entered as given by the king and lords BY THE ASSENT of the commons, whereas before it was BY the king and lords and *totam communitatem,* which though in ſubſtance the ſame, yet the variation of the ſtile ſeems to be induſtriouſly done.

ROT. *parl.* 40. *E.* 3. *m.* 2. * the proof of the age and livery made thereupon to William de Septvans is reverſed and annulled *coram*

* According to the printed roll, it ſhould he *m.* 14. b.—F. H.

domino rege prælatis proceribus et magnatibus et COMMUNITATE ANGLIÆ *in parliamento.*

OTHER inſtances of this nature in petitions of error might be given, as *rot. parl.* 21. *E.* 3. *n.* 65. 25. *E.* 3. *n.* 54. for John Matravers; *ibidem n.* 8. *et* 9. *pro comite Arundel.*

YEA, and it ſhould ſeem in ſome caſes, though the petitions of errors were to the king and lords, and the record thereupon removed into the lords houſe; yet the commons were called up, and the judgment of affirmance or reverſal and the award of execution thereupon *in pleno parliamento.* Thus it ſeems to be done in the caſe of the prior of Mountegne againſt Seymer, *rot. parl.* 17. *R.* 2. *n.* 20. *et* 8. *R.* 2. *n.* 15. which I ſhall mention more at large hereafter.

AND thus far touching the reverſal or affirmance of judgments upon petitions of error *in pleno parliamento.*

SOMEWHAT I ſhall add touching reverſall and affirmance by writ of error *in pleno parliamento,* which were not in antient times ſo uſual as petitions of that kind.

THE only precedent, that I find of this nature by writ, is that in Raſtall's Entries title *error en parlement,* which appears to be a writ of error brought as I take it in the parliament of 1. *H.* 7. upon a judgment given in the king's bench in the time of *E.* 4. The writ was to remove the record *coram nobis in parliamento, ut, inſpectis recordo et proceſſu prædictis, nos, de conſilio et adviſamento dominorum ſpiritualium et temporalium et* COMMUNITATIS *in parliamento noſtro prædicto exiſtentium, ulterius pro errore illo corrigendo fieri faciamus, quod de jure et ſecundùm legem et conſuetudinem regni Angliæ fuerit faciendum.*

THIS writ ſeems to be in that very caſe of 1. *H.* 7. 19. Howerdine's caſe; and the time of its iſſue and the firſt letters of ſome of the

the names ſeem to accord with the parties in that record : upon which caſe, notwithſtanding, the judges there agree, that the commons ought not to have a voice, but only the lords with the advice of the judges. And poſſibly there might be a new writ brought accordingly. But ſurely ſuch a writ as this, though not in the uſual form that obtained in latter ages, might iſſue; and upon ſuch a writ the commons would have been intereſted in the judgment, as well as in the caſes of the proceeding upon petition of error abovementioned, where the commons had alſo a concurrent voice, though this hath been long diſuſed.

CHAP. XXIII.

CONCERNING PETITIONS AND WRITS OF ERROR IN THE LORDS HOUSE, AND THE FORMS AND PROCEEDINGS THEREUPON.

ALTHOUGH in antient times there were petitions, and poſſibly ſome writs of error, which did intereſt the commons in point of judicature, or at leaſt conſent or diſaſſent to the judgment; yet theſe two things are to be noted:—1. That even in the antienteſt times whereof we have any memorials of record, as the times of *E.* 1. *E.* 2. and *E.* 3. the petitions and writs of error in the houſe of lords were more frequent and more frequently there determined than *in pleno parliamento.*—2. That from the beginning of Richard the ſecond's time downward to this day there are very few if any petitions or writs of error brought before both houſes or determined by them, but only in the houſe of lords, except that one inſtance in Raſtall's Entries abovementioned, which nevertheleſs is encountered by the opinion of the judges in 1. *H.* 7. 19. And this eſpecially after the beginning of the reign of *H.* 4. where the judicature of the houſe of lords was ſo liberally aſſerted by the commons, *rot. parl.* 1. *H.* 4. *n.* 79. *Les communes fierent proteſtation, &c. que come les judgements du parlement perteignent ſolment al roy et les ſeigneurs et nient al communes, ſi non pleiſt au roy de ſa grace ſpeciall leur monſtrer les dits judgements pur eoſe de eux, que nul record ſoit fait en parlement encontre les communes, que ils ſont ou ſerront parties al aſcuns judgements dones ou a donner apres en parlement. A quoi feut reſpondus par l'archeveſque de Canterbirs par commandement le roi, comment meſmes les communes ſont petitioners et demandeurs, et le roy et les ſeigneurs de tout temps ont eues et averont du droit les judgements en parlement, en manere come meſmes les communes ont monſtres, ſauve, que en ſtatutes a faire, ou en graunts des ſubſidyes, ou tiel choſes a faire pur le common profit de realme, le roy voet aver eſpecial-*

ment

ment leur adviſe et aſſent; et que cel ordre de fait ſoit tenus et gardez a touts temps avener.

AND now I ſhall proceed to ſhew the methods of proceedings in the houſe of lords in caſes of writs or petitions of error, and give the hiſtory thereof in ſucceſſion of ages.

WRITS or petitions of error or falſe judgment are of a higher nature than other kinds of civil ſuits. They are *quaſi caſus reſervati* to the king's ſpecial cognizance. And therefore by the ſtatute of Marlbredg *cap.* 20. *nullus excepto domino rege teneat placitum in curid ſud de falſo judicio in curid tenentium ſuorum, quia hujuſmodi placita ſpecialiter pertinent ad coronam et dignitatem domini regis.*

AND hence it is, that even in the greateſt courts of ordinary juriſdiction, the king's bench or common pleas, thoſe courts cannot, barely by virtue of their ordinary juriſdiction, without the king's writ under the great ſeal, hold plea to reverſe a judgment given in an inferior court of record; no, not ſo much as a judgment in a court baron or hundred court, though no courts of record.

AND the reaſons are theſe two principally.

1. IN reſpect of the king, all juriſdiction is mediately or immediately derived from him; and the courts of all kinds are his courts, and have that ſtile (unleſs in counties palatine where the lord hath *jura regalia*, and yet even that is derived from the crown), and conſequently judgments there given are virtually given by the king; and therefore it is not reaſonable to have them examined, but by the king's writ or commiſſion derived from him ſpecially.

2. IN reſpect of the ſubject, who having run his courſe to obtain or defend his right in the ordinary courts of juſtice, it is not reaſonable

able after his long expectation and expence to turn all about again without the ſolemnity of the king's ſpecial writ or commiſſion.

BUT the reaſon holds more effectually in caſes of errors brought in parliament upon theſe accounts.

1. THOUGH the court of parliament be the higheſt court of juſtice; yet it is an extraordinary court, and the primitive and principal end is to adviſe the king *circa ardua regni*. And therefore it is not reaſon to take up their time, in matters of leſs moment and where the common buſineſs of the king and kingdom is not ſo much concerned, without the king's ſpecial command; ſuch as writs and petitions of error between party and party.

2. MANY times ſuch writs or petitions of error would be brought in parliament in trivial cauſes and for delay, and without any juſt cauſe, which is fit by all reaſonable ways to be avoided.

3. THE proceedings in parliament muſt neceſſarily be very dilatory and expenſive, in reſpect of the intervention of public buſineſs, and their frequent adjournment prorogations and diſſolutions. And therefore it is not reaſonable, that they ſhould be ordinarily proſecuted in parliament, unleſs in caſes of great moment, and by the more ſpecial direction or command of the king and ſometimes of his council alſo.

4. THE ſuits for error in parliament are for the moſt part upon judgments given in the higheſt court of ordinary juſtice, viz. the king's bench, where the proceeding is *coram ipſo rege*, and the diſcuſſion of cauſes by judges of great learning and experience. And therefore it is not reaſonable, that judgments, which are in effect given more eſpecially by the king than in other courts, ſhould

ſhould be examined and drawn into a ſecond examination without the king's ſpecial command or commiſſion.

AND upon theſe reaſons, though in the ordinary courts of juſtice the writ of error is *breve de curſu*, and grantable in chancery of courſe; yet to remove a record for error into parliament, whether it be by petition or writ, it is not to be granted without a petition to the king and a bill ſigned to that effect, as ſhall be ſhewn; for ſuch petitions to the king were to be preliminary before any ſuch writ or removal of a record into parliament, to the end that the king might adviſe with his council,—whether the writ of error lies or not; or if it lies, whether it muſt be according to the nature of the cauſe *in pleno parliamento*, or in the lords houſe; whether the caſe be of that moment or weight as to be brought into parliament; and whether there be probable cauſe of error, or it be only for delay.

THESE and the like were the reaſons why always parliamentary petitions were made to the king, and ſometimes to the king and his council, and ſometimes to the king and nobles, before any record was to be removed in parliament for error, or ſo much as a writ of error iſſued for that purpoſe, as ſhall be ſhewed more at large.

THIS being therefore premiſed, we are to know, that there are and have been two methods of removing records into parliament, or into the lords houſe in parliament, by way of error.

I. BY petition to the king, or to the king and his council in parliament, or to the king and lords in parliament, ſetting forth the cauſe of complaint; and praying that the record may be removed into *plenum parliamentum*, or into the lords houſe in parliament, to examine the errors, and do right to the party. And thereupon if the

the petition were indorſed, that it be done, the chief juſtice was commanded by order of the king, and ſometimes of the king and lords, and ſometimes of the lords, to bring the record into parliament; and thereupon the party aſſigning his errors, a *ſcire facias* iſſued to the ſheriff under the great ſeal, to give notice to the defendant *ad audiendos errores*, returnable moſt commonly the next parliament.

And this petition thus indorſed was in nature of a ſpecial commiſſion to the parliament to proceed in examination of the errors; for the petition and indorſement were both of record and filed of record, and moſt commonly entered upon the parliament roll.

And this certainly was the moſt uſual courſe of removing the record; for, the chief juſtice being ordinarily preſent in parliament, and having ſuch a command *ore tenus* or by order, there was no need of a ſpecial writ of error to command him.

And this I take to be the reaſon, why in the Regiſter, though there be a precedent of a *ſcire facias ad audiendum errorem in parliamento*, there is no precedent of any writ of error in parliament. For they were not ſo much in uſe as petitions only in ancient time; though ſometimes they iſſued, eſpecially where the chief juſtice was not preſent to remove the record, for then it was neceſſary he ſhould be commanded by writ to do it.

II. The ſecond method to remove the record into parliament was by writ of error directed to the judge, that had the cuſtody of the record, to bring it into parliament. And this hath been the method generally uſed, eſpecially ſince the time of *E.* 4. and is much more ſecure for the judge that brings up the record, and more regular than the other way of petition. And of this more at large hereafter.

These

THESE then being the two methods ancient and modern for removing records for error into parliament, I ſhall in the next Chapter give the narrative touching the various forms of petitionary bills of error in parliament, which will be equally applicable to writs of error, where they were uſed, as ſometimes though not always was practiſed, in ancient times as well as modern times.

CHAP. XXIV.

CONCERNING THE ANCIENT FORMS OF PETITIONS FOR REMOVAL OF RECORDS INTO PARLIAMENT FOR ERROR.

THE petitions for examining of errors in parliament, or in the lords houſe in parliament, were in the moſt ancient times only to the king, or to the king and his council, or to the king and his council in parliament. And thus it was conſtantly uſed till ſome time after the beginning of the reign of *R.* 2. But after that time, though that form was ſometimes uſed; yet commonly the ſtile of petitions of error was *al roy et al nobles*, or *nobles ſeigneurs en parlement*; as *rot. parl.* 16. *R.* 2. *n.* 18. in the caſe of Shepey; *ibid. n.* 19. in the caſe of Baſſel; 1. *H.* 4. *n.* 19. in the caſe of Hexy; 2. *H.* 4. *n.* 37. in the caſe of Holt; *ibid. n.* 39. in the caſe of Baſſett; *rot. parl.* 6. *H.* 4. *n.* 61. in the caſe of Deyncourt; 1. *H.* 5. *n.* 19. in the caſe of Gunwardby; 3. *H.* 5. *n.* 19. in the caſe of Colerman; and 8. *H.* 6. *n.* 70. in the caſe of the prior of Lanthony.

Now touching the matter of ſuch petitions, it was for the removal of the record, to the end that the errors may be examined. And theſe petitions, as in reference to the removal of the record, were of four kinds.—I. To remove the record in parliament, to the end the errors may be examined *in pleno parliamento.* Such were thoſe, which I have at large declared *ſupra* CHAP. XXI. and therefore I ſhall ſay no more thereof here.—II. Such as were to remove the record *coram rege et conſilio*, or *coram rege et conſilio in parliamento.*—III. Such as were to remove the record *coram prælatis magnatibus et proceribus in parliamento.*—IV. Such as were to remove the

the record *coram prælatis et magnatibus*, but yet with a ſpecial reſtriction of the examination of the errors to ſome ſelect lords and others appointed by the king.

II*. As to the ſecond of theſe, viz. to return the record *coram nobis et conſilio*, which ſometimes is ſo in the petition, ſometimes in the indorſement of the petition, and moſt ordinarily in the *ſcire facias ad audiendum errores*; it is to be obſerved, as I have before noted, the *conſilium ordinarium* had no power or juriſdiction to examine errors and reverſe judgments, unleſs they were embodied in the parliament: *quod vide* 39. *E.* 3. 14.—But when the parliament was ſitting, the *conſilium ordinarium* was concerned in petitions of error: but how far we ſhall ſee hereafter.—And thus muſt thoſe records of reverſals *coram rege et conſilio* be neceſſarily intended, not of reverſals by the king's *ordinarium conſilium*, out of parliament, but by the king and his council in parliament. *Rot. parl.* 18. *E.* 1. Ryley p. 57. the petition of error by the abbot of Weſtminſter; *ibid.* p. 62. upon the petition of Peter Mantar; *ibid.* 144. upon the ſuit before the *auditores querelarum* in Scotland; *ibid.* 168. 172. of a judgment before juſtices itinerant: though I muſt confeſs, ſometimes *coram rege et conſilio* is intended in the king's bench in thoſe ancient times. Ryley 174. 183. in the caſe of error upon an outlawry againſt Stutevill.

THE ancient form of writs and petitions of error and *ſcire facias* thereupon granted run many times thus, viz. to have the record or to appear *coram nobis et conſilio in parliamento, ut inſpectis, &c. de adviſamento conſilii noſtri fieri faciamus, quod de jure et ſecundùm conſuetudinem regni noſtri Angliæ fuerit faciendum.* This was the ancient form of error in the parliament; which continued in uſe moſt commonly till about the beginning of *R.* 2.

* The reaſon for omitting the firſt head is given before, page 138.——F. H.

AND upon this writ theſe things are obſervable:

1. THAT writs of error did not lie *coram conſilio* unleſs it were in parliament, as I have obſerved upon the book of 39. *E.* 3. 14.

2. THAT by this writ or form of removing of records *coram conſilio in parliamento* the records were to be removed into the upper houſe of parliament.

3. THAT by this writ and form of removing of records and to proceed *de adviſamento conſilii* it ſeems to me, that in ancient times, as of *E.* 1. *E.* 2. and the beginning of *E.* 3. the *conſilium legale*, viz. chancellor, juſtices, &c. were not barely aſſiſtants, but had a voice of ſuffrage as well as of advice in the affirming or reverſing of judgments, &c. though in proceſs of time the grandeur of the lords got in effect the whole juriſdiction from the *conſilium ordinarium*, and left them only as aſſiſtants and adviſers, which ſeems thus to obtain about the beginning of *R.* 2.

4. THAT yet even in theſe ancient times the *conſilium ordinarium* was not only that which was intended by the words *de adviſamento conſilii noſtri*, but it alſo included the lords in parliament; for the words *conſilium noſtrum in parliamento* moſt ordinarily intended the whole upper houſe of parliament in writs of error, and moſt commonly in other judicial proceedings in parliament.

5. THAT when by the power and grandeur of the lords they obtained as it were the whole juriſdiction, and the *conſilium ordinarium* became but in nature of aſſiſtants, &c. the words *coram conſilio* and *de adviſamento conſilii* with the addition of thoſe words *in parliamento* were applicable and uſually applied to the lords in parliament.

NOW for inſtances to make good theſe collections.

IN

In the parliament of 21. *E.* 1. Ryley 140. the judgment againſt the archbiſhop of York is, *propter quod per comites barones et juſticiarios et omnes alios de* CONSILIO *domini regis unaniniter ordinatum eſt.* —And the like *ibidem* 165. in the caſe of the prior of Bermondſey, *et ſuper hoc in pleno conſilio habito tractatu, &c.* Here the lords, as well as the juſtices, and theſe as well as thoſe, come under the name or ſtile of *conſilium regis.*

Again, *rot. parl.* 1. *R.* 2. *n.* 29. *&* 2. *R.* 2. *part.* 2. *n.* 19, 20. the petition of error by the earl of Saliſbury againſt Mortimer is, that the king would command the record to be brought *devant vous et votre tres ſage councell en ce preſent parlement,* and proceſs againſt Mortimer to hear the errors. Thereupon it is commanded *par les prelats et ſeigneurs peres de parlement* to Cavendiſh the chief juſtice to bring the record, which was accordingly brought into the lords houſe; and after errors aſſigned a *ſcire facias* iſſued againſt Mortimer to appear in the next parliament *ad audiendum errores,* which recites the petition, *et quòd nos, ſupplicationi prædicti comitis annuentes, recordum et proceſſum prædictos tam coram nobis quàm prælatis et magnatibus in dicto parliamento venire fecimus;* and it is thereby commanded to the ſheriff of Salop to ſummon defendant, *quòd ſit in proximo parliamento, ubicunque tunc fuerit, auditurus recordum et proceſſum, et ulterius facturus et recepturus quod tunc ibidem conſiderari contingeret, &c.* Here *coram rege et conſilio in parliamento* in one part of the record is *coram nobis prælatis et magnatibus* in another part of the record: and yet all this tranſacted in the lords houſe and by the lords in parliament.

And thus *conſilium in parliamento* is applicable to the lords in parliament and to their juriſdiction. So as to the word *curia noſtra in parliamento* and *curia noſtra parliamenti,* though in ſome records it is applicable to both houſes, yet it is moſt ordinarily in theſe called applicable to the lords in parliament and the lords houſe in parliament.—*Rot. parl.* 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe, the

the *ſcire facias* is, *quòd ſit coram nobis in parliamento, &c. ad faciendum & recipiendum quod curia noſtra conſideraverit.—Rot. parl.* 17. *R.* 2. *n.* 13. & 14. 1. *H.* 5. *n.* 19. 3. *H.* 5. *n.* 19. it is, *ad faciendum et recipiendum quod curia noſtra parliamenti conſideraverit.* And in the Regiſter 17. the *ſcire facias* is, *quòd ſit coram nobis et conſilio noſtro in parliamento, &c. et ulterius ad faciendum et recipiendum quod curia noſtra parliamenti conſideraverit.* In all theſe and infinite more it appears, that proceſs in and upon writs or petitions of error *coram nobis in parliamento*, or *coram nobis et conſilio in parliamento*, or *facere quod tunc et ibidem contigerit ordinari*, or *quod curia noſtra conſideraverit*, or *quod curia noſtra parliamenti conſideraverit*, or *quod de adviſamento conſilii noſtri in parliamento ordinari contigerit*, are but ſo many expreſſions of the lords in parliament or lords houſe in parliament in caſe of proceſs upon writs or petitions of error.

And thus far touching writs or petitions to remove records according to the ancient form, which was ſometimes *coram nobis in parliamento*, ſometimes *coram nobis et conſilio in parliamento*, and ſometimes *in curiam parliamenti, &c.*

III. The next form was more explicit, viz. to remove records *coram nobis prælatis et proceribus in parliamento*, and ſometimes *coram nobis in parliamento*, but to proceed *de adviſamento prælatorum magnatum et procerum in parliamento*, expreſly limiting it to the lords in parliament; and though it were ſometimes the form in the time of *R.* 2. yet after the beginning of *H.* 4. it became the uſual ſtile expreſly to mention the prelates and lords.

And this, it ſeems, obtained upon two reaſons:—1. Becauſe the lords were intent as much as poſſible to exclude the commons from a concurrent judicature in ſuch caſes, which poſſibly was not ſo well obviated by the general words of *parliamentum* or *curia noſtra par-*

parliamenti, which by conſtruction might poſſibly extend to both houſes.—2. Becauſe they were intent alſo to exclude the *conſilium ordinarium* from a concurrent voice in theſe caſes, and to bring them to be only aſſiſtants; which was better effected by making the petition or proceſs *coram prælatis proceribus et magnatibus in parliamento*, than by the words *coram nobis et conſilio in parliamento*, which poſſibly by a liberal conſtruction might intitle the *conſilium ordinarium* to a voice in judicature.

THE inſtances of theſe variations and various forms in petitions, writs, and proceſs upon error, will be given hereafter in the ſeveral kings reigns.

IV. THE next kind of forms in proceſs upon errors in parliament was, where, although the records were removed into the lords houſe by writs or bills of error, yet the diſcuſſion of the errors was committed by the king to a ſelect number, ſometimes of lords and judges, ſometimes of judges only. But of this more at large in its proper place hereafter.

CHAP.

CHAP. XXV.

CONCERNING REMOVAL OF RECORDS INTO THE LORDS HOUSE BY WRIT OF ERROR.

IN the former Chapter I have given an account, that there are two ways of removing of a record into the parliament for error, viz.—by petition, which was the more antient and more uſual in antient times;—or by writ, which hath been the common courſe of latter ages to bring or remove a record for error into the lords houſe in parliament.

IN reſpect to the latter, I ſhall conſider theſe things.—1. How the uſual form of the writ runs. 2. How it is to be obtained. 3. When it is to be ſued, and how made returnable.

1. As to the form of the writ, it uſually runs thus. *Rex capitali juſticiario, &c. quia in recordo et proceſſu et redditione judicii loquelæ, &c. ad grave damnum prædicti I. S. ſicut ex querelâ ſuâ accepimus, nos, errorem, ſi quis fuerit, debito modo corrigi, et partibus prædictis celerem juſtitiam in hâc parte fieri, volentes, vobis præcipimus, quòd, ſi judicium inde redditum ſit, tunc recordum et proceſſum prædicta, cum omnibus ea tangentibus, nobis in præſens parliamentum* (if the parliament be ſitting) or *nobis in parliamentum noſtrum apud Weſtmonaſterium die, &c. proximè tenendum* (if the parliament be not ſitting but only ſummoned or under prorogation) *ſub ſigillo noſtro diſtinctè et apertè ſine dilatione mittatis, et hoc breve; ut, inſpectis recordo et proceſſu prædictis, ulterius inde de aſſenſu dominorum ſpiritualium et temporalium in eodem parliamento exiſtentium pro errore illo corrigendo fieri faciemus, quod de jure et ſecundùm legem et conſuetudinem regni noſtri Angliæ fuerit faciendum. Teſte, &c.*

THIS

THIS is the form of the writ, as it is now uſed, in writs of error in the lords houſe. Whereby it appears, that it much differs from the form of the writ in Raſtal's Entries mentioned before, and likewiſe from thoſe writs, which were antiently, *ita quòd de adviſamento conſilii noſtri in parliamento*, or *de adviſamento conſilii noſtri parliamenti*. But it expreſsly limits it, *ita quòd de aſſenſu dominorum ſpiritualium et temporalium fieri facianus*, &c. When the alterations were made, or by whom, cannot eaſily be found without ſearch of all the antient writs of error, many whereof were long ſince loſt or miſlaid.

2. As to the manner of its obtaining, it is true, a writ of error in parliament is *breve de curſu* as to ſome purpoſes, and therefore made by the curſitor; but yet for the reaſons given in CHAP. XXIII. it ought not to paſs the ſeal without a petition or bill to the king, and that bill ſigned by him. And the writ itſelf was antiently, and ſtill ought to be *per regem*, or *per warrantum domini regis*; and this appears expreſsly by the books of 22. *E.* 3. 3. 1. *H.* 7. 19. Flourdew's caſe; and *Dy.* 375. and by the conſtant indorſement of theſe writs, viz. *per regem.*

AND this courſe antiently obtained till the long parliament; where, by reaſon of the king's abſence, he that then exerciſed the office of attorney general did grant his warrant to the curſitor for the making of writs of error returnable in parliament, and the writ was indorſed *per warrantum attornati domini regis generalis.* And upon that account it hath been alſo ſo practiſed ſince the king's reſtoration, which is an error and ought to be reformed.

3. As to the time of iſſuing it, although out of parliament time, yea though a parliament be not ſummoned, the king may upon a petition grant a warrant for a writ of error to be iſſued. Yet it ſeems the writ ought not to iſſue till a parliament ſummoned; becauſe it can have no certain return, as it ought to have, for the chief juſtice to bring the record. And beſides it would be to no purpoſe; for if

a writ of error were brought to remove the record *in proximum parliamentum* before a parliament ſummoned, though this might be warrant enough for the chief juſtice upon the firſt day of the next parliament to bring up the record, upon which the errors may be aſſigned, and a *ſcire facias* iſſue againſt the defendant, and thereupon proceeding may be to examine the errors; yet this writ of error would be no *ſuperſedeas* to the king's bench to iſſue execution before the parliament; becauſe there is no certain time when it ſhall be returned, inaſmuch as it is uncertain, whether and when a parliament ſhall be ſummoned; and it may be ſo long before a parliament be ſummoned, that it would give an exceſſive delay to juſtice, if it ſhould in the mean time ſuperſede execution.

CHAP.

CHAP. XXVI.

CONCERNING THE METHOD OF REMOVING THE RECORD INTO PARLIAMENT, AND THE PROCEEDING THEREUPON.

I HAVE in the former Chapters laid down the warrant for removing of a record for error into the lords houſe in parliament, viz. either by petition to the king, or to the king and his council, or to the king and the lords ſitting the parliament, and the king's anſwer thereupon that it be done; or by petition to the king for a writ of error, and a bill ſigned thereupon, and a writ iſſued upon ſuch bill ſigned.

THESE are in nature of commiſſions from the king for the examination in parliament of errors in the king's bench or chancery, or ſuch other courts, as are as it were immediately next below the lords houſe in parliament, or upon judgments given in the houſe of lords itſelf.

BUT becauſe ſuits of error in parliament are for the moſt part upon judgments given in the king's bench, and the method uſed in parliament upon ſuch judgments doth in effect *mutatis mutandis* ſquare with errors in parliament out of other courts, I ſhall keep myſelf principally to ſuch inſtances as concern error upon judgments given in the king's bench.

IF the warrant for the examination of the errors be upon original petition in the parliament, and not by writ of error, the entry is, *quâ quidem petitione lectâ et auditâ, præceptum eſt I. C. capitali juſticiario*; ſometimes *per dominum regem* only, as in the caſe of Mortimer, *rot. parl.* 28. *E.* 3. *n.* 8. of the earl of Lancaſter, *clauſ.* 1. *E.* 3. *part.* 1. *m.* 21. *dorſ.*; ſometimes, but rarely, *per prælatos proceres et*

magnates only, *rot. parl.* 1. *R.* 2. *n.* 28. in the caſe of the earl of Saliſbury againſt Mortimer; but moſt ordinarily *per dominum regem et dominos in parliamento, rot. parl.* 8. *R.* 2. *n.* 15. in the caſe of the prior of Mountegne; ſometimes *per dominum regem ex aſſenſu dominorum in parliamento, rot. parl.* 1. *H.* 5. *n.* 19. the caſe of Gunwardby; ſometimes generally *præceptum eſt*; and ſometimes *ex aſſenſu parliamenti præceptum eſt,* to the chief juſtice to bring the record preſently into parliament.

THIS being done, then the errors are to be aſſigned: though many times antiently the errors were aſſigned in the petition, and a *ſcire facias* thereupon granted. But this was irregular; and therefore when in the parliament of 18. *R.* 2. there was a judgment given for the prior of Newport-Pagnell reverſed in parliament, the prior brought a petition of error again in the lords houſe, and aſſigned for error, that the *ſcire facias* iſſued before the record of the firſt judgment brought into parliament. *Rot. parl.* 2. *H.* 4. *n.* 43. and *rot. parl.* 4. *H.* 4. *n.* 26.

WHEN the chief juſtice brought up the record, the record was read, and in antient time entered of record in the rolls of parliament. And then the party complaining aſſigned his errors in writing, and thereupon had a *ſcire facias* to warn the defendant in the error to appear in the next parliament or next ſeſſion of parliament *ad audiendum errores* directed to the ſheriff of the county where the land lay, if it was for land, &c.

AND here ſome things are inquirable for the better diſcovery of the antient practice.—(1.) What was done with the record.—(2.) What and in what manner the *ſcire facias* iſſued.

(1.) As to the firſt of theſe there have been three methods.—1. The chief juſtice by the command or order *ut ſupra* brought the record into parliament, whereupon the plaintiff aſſigned his errors; and

and thereupon a *ſcire facias* awarded againſt the defendant returnable the next ſeſſion of parliament; and it was then commanded to the chief juſtice to have the record again in parliament at the return of the *ſcire facias*, that ſo they might proceed upon the errors; and in the mean time the record was carried back after the errors aſſigned and *ſcire facias* awarded, becauſe the ſame roll concerned divers other matters. Thus it was done *rot. parl.* 1. *R.* 2. *n.* 29. in the earl of Saliſbury's caſe; 1. *R.* 2. *part.* 2. *n.* 31. in the ſame caſe; 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe; and 16. *R.* 2. *n.* 18. in Shepey's caſe.—2. Sometimes the chief juſtice upon the petition brought in the record, and the record thereof was entered again of record by the clerk of the parliament; and then they might proceed without a ſecond bringing up of the record by the chief juſtice. Thus it was done *rot. parl.* 28. *E.* 3. *n.* 8. in the caſe of Mortimer.—3. But in the time of *H.* 4. that courſe was ſettled, which hath obtained to this day as well upon writs as petitions of error, viz. when the chief juſtice was commanded either by petition of error or by writ of error to bring the record into parliament either *indilatè* or at a day certain, he brought up the roll and a tranſcript of the record, and left the tranſcript and roll with the clerk of the parliament to be examined, and then the ſame day or ſome ſhort time after the rolls themſelves were carried back into the treaſury. And this hath obtained to this day. In the parliament of 18. *Jac.* when the chief juſtice of the king's bench was made ſpeaker of the lords houſe by commiſſion on the ſuſpenſion of the lord keeper, yet it was reſolved 14. *Maii* 1621. in that parliament, that upon a writ of error he ſhould bring in the record as chief juſtice.

(2.) As to the *ſcire facias*, when the party hath aſſigned his errors, he prays a *ſcire facias*: which, as hath been ſhewed, is entered ſometimes to be commanded by the king alone; ſometimes by the peers alone, as 1. *R.* 2. *n.* 29. in the caſe of the earl of Saliſbury; but moſt commonly by the king and lords, or by the king with the aſſent

aſſent of the lords or advice of the lords, *rot. parl.* 2. *R.* 2. *part.* 2. *n.* 31. In Catermaine's caſe, *rot. parl.* 1. *H.* 5. *n.* 19. it is ſaid to be *ex aſſenſu parliamenti*; yet it was only by the king and lords.

In this matter two things are conſiderable.—1. The form of the writ.—2. The time of its return.

1. The form of the writ of *ſcire facias* hath in ſome circumſtances differed in ſeveral ages. Sometimes, *quòd ſit coram nobis in parliamento, &c. tali die ad audiendum recordum et proceſſum et errores prædictos, et ulterius facturus et recepturus, quod per legem terræ conſideratum fuerit in hâc parte, rot. parl.* 16. *R.* 2. *n.* 18. in Shepey's caſe. Sometimes, *ad faciendum et recipiendum, quod curia parliamenti conſideraverit,* 1. *H.* 5. *n.* 19.;—*quod per legem terræ in curiâ parliamenti contigerit adjudicari,* 3. *H.* 5. *n.* 19. Catermaine's caſe;—*Regiſtr.* 17. *quod curia noſtra conſideraverit in hâc parte, rot. parl.* 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe;—*facturus et recepturus quod tunc et ibidem conſiderari contigerit, rot. parl.* 2. *R.* 2. *par.* 2. *n.* 19.;—and *ad faciendum et recipiendum quod nos de aſſenſu dominorum ſpiritualium et temporalium in eodem parliamento duxerimus ordinandum,* as in the modern *ſcire facias* upon writs of error in latter ages.

2. As to the *teſte* of the *ſcire facias* and the return thereof, regularly the *ſcire facias ad audiendum errores* was returnable the next parliament or the next ſeſſion of parliament. But though the award was ſuch, yet the writ was rarely if at all taken out till the new parliament ſummoned; for till the ſummons iſſued for the parliament or a certain day given by prorogation, it was uncertain, whether or when the parliament would be held. This appears partly by the *Regiſter* 17. but more fully *rot. parl.* 2. *R.* 2. *part.* 1. *n.* 19. 8. *R.* 2. *n.* 15. and 2. *H.* 5. *part.* 2. *n.* 11.

But where the king's intereſt was only concerned, as to reverſe a judgment for the king or an attainder, there went out no *ſcire facias*

ad

ad audiendum errores; becauſe the king is always preſent in court and cannot be made party by a *ſcire facias*. *Rot. parl.* 10. *H.* 6. *n.* 52. Jane Beachamp's caſe. *Vid. rot. parl.* 2. *H.* 4. *n.* 37. 39. for Holt and Burgh and Burly to reverſe attainders in 11. *R.* 2. and 1. *H.* 4. *n.* 90. for Thomas Haxey.

THE ordinary return of the *ſcire facias* was *ad proximum parliamentum*; for their ſeſſions were ſhort and uncertain; and if it ſhould be returnable at a day certain (as it muſt) in the ſame ſeſſion, the ſeſſion might end before the return of the writ. But in caſes where no *ſcire facias* was to iſſue, as where the king was party, the errors were oftentimes examined the ſame parliament wherein the petition of error was exhibited.

BUT in the late king's parliaments that antient courſe was altered; for they made writs of error returnable *in præſens parliamentum*, and gave notice by orders from day to day to the defendant. And this courſe holds now in uſe, the old way of *ſcire facias* returnable the next parliament being laid aſide: yet without any law at all to warrant it; for the record cannot be reverſed or affirmed without making the defendant party by writ, unleſs he appear *gratis* without a *ſcire facias*, and plead to the errors. This is now the common courſe, and the defendant commonly appears upon orders of the houſe without any *ſcire facias*, and pleads to the errors *gratis*; which therefore being done *gratis* ſupplied the defect of a regular proceſs, which yet the defendant may inſiſt upon if he will.

AND thus far touching the proceſs and proceedings in writs of error preliminary to the diſcuſſion and determination thereof.

CHAP.

CHAP. XXVII.

CONCERNING THE JUDGES OR PERSONS BY WHOM THE JUDGMENT OF AFFIRMATION OR REVERSAL IS GIVEN IN PARLIAMENT.

THE defendants appearing *gratis* or by proceſs, and pleading to the errors *in nullo erratum*, the next thing conſiderable is, how or by whom the judgment is given.

Now upon a writ of error—either the whole determination of the caſe ſtands upon the matter, as it appears upon the record:—or there intervenes a matter of fact to be firſt ſettled before the errors upon the record can be examined or determined; which commonly is in two kinds or caſes; 1. where the error aſſigned is an error in fact, as nonage, coverture, &c. 2. where a matter of fact is pleaded in bar or abatement of ſuch writ of error, or a matter triable by the country ariſeth upon ſuch a plea; as where a releaſe is pleaded and denied, or a fine is pleaded and *nient compriſe* is replied to it.

I SHALL begin with this latter conſideration; namely, where matter of fact is aſſigned for error or ariſes upon pleading.

I NEVER knew an error in fact aſſigned upon a writ of error in parliament; neither indeed is it needful it ſhould; for the king's bench, being the uſual court out of which records are removed by writs of error into parliament, may reverſe their own judgments before themſelves for errors in fact; and ſo there needs no writ of error in parliament upon ſuch occaſion.

BUT ſuppoſe, that a writ of error be brought in parliament for all this, and an error in fact be aſſigned and put in iſſue; or ſuppoſe a releaſe be pleaded and put in iſſue; how ſhall it be tried?

I CONFESS

I CONFESS I never knew ſuch a caſe happen. But if it ſhould ſo happen, I think the regular way is to ſend it into the king's bench to be tried, as where an iſſue is joined in chancery. Only there may be this difference, that whereas upon an iſſue joined in chancery and ſent into the king's bench to be tried, the king's bench finally gives judgment without remanding it to the chancery; yet poſſibly the record being ſent out of parliament is to be remitted thither with the verdict, that the judgment of affirmance or reverſal may be given in the lords houſe. And although poſſibly, where the iſſue upon an error in fact is found for the plaintiff or defendant, or for the defendant upon a plea of releaſe, there is no inconvenience, if the judgment be given in the king's bench; yet if the iſſue upon the releaſe be found for the plaintiff, it ſeems neceſſary the record ſhould be remitted; becauſe the judgment cannot be reverſed notwithſtanding ſuch verdict, till the errors upon the record be examined, which is proper to be done only in parliament.

BUT now let us reſume the former conſideration, where *in nullo erratum* is pleaded to the errors aſſigned of record, how and in what manner and by whom is the judgment given either of affirmance or reverſal.

THERE are four parties, whom this inquiry may concern, viz. the king, the lords, the commons, and the judges or *conſilium regis*, or ſuch of them as are ſpecially deputed thereunto.

I. IN all judgments of affirmance or reverſal in parliament the king is actually or virtually a party to the judgment; for there is ſcarce one entry of twenty, but the judgment is entered, *conſideratum eſt per dominum regem ex aſſenſu magnatum, &c.* or *per magnates, &c. ex aſſenſu domini regis*, as ſhall appear by the numerous inſtances, which I ſhall have occaſion to mention in the enſuing Chapters. But

yet I do not think it neceſſary, that the king ſhould be actually preſent or pronounce the judgment. For inaſmuch as before is ſhewed, whether the reverſal be by writ or upon petition, the king's aſſent is requiſite to the removing of the record in parliament, and ought firſt to be given and endorſed upon the bill ſigned. This doth ſufficiently commiſſionate the lords in parliament, or thoſe others to whom that buſineſs is committed, to proceed in virtue of the king's authority. And ſo the king is virtually conſenting to the judgment by them given; which is in law as effectual, as if he were actually preſent and joined in the judgment or pronounced it himſelf in perſon with conſent of the lords, &c. and warrants the entry to be *per dominum regem* or *ex aſſenſu domini regis*, as if he were actually preſent. How far the king, after ſuch removal of a record by his conſent, may either retract his aſſent or have a negative voice, I ſhall not here examine. But it ſeems to me, that he can no more deny the affirmance or reverſal of ſuch a judgment, than he can ſuſpend a judgment of affirmance or reverſal in the king's bench by the ordinary judges of that court, though the pleas be there held *coram rege*; for he hath committed the ordinary juriſdiction in ſuch caſes to his ordinary judges.

II. If a writ or petition of error be before both houſes of parliament, as in the caſes of the earls of Lancaſter and March and the biſhop of Hereford *ſupra* Chap. XXII. there both houſes of parliament are to be conſenters to the reverſal or affirmance, or nothing is effected: for by the king's commiſſion both houſes are made as it were *judices ordinarii*; and if both houſes conſent not, nothing can be done. But as hath been ſaid, ſuch bills or writs of error, though uſed ſometimes (and yet but rarely) in antient times, have been very long out of uſe.

III. If

III. If a bill or writ of error be made returnable before the lords in parliament according to the uſual form of writs of error now in uſe, the judgment at this day is authoritatively given by the lords houſe; the entries whereof, as ſhall be ſhewn, are various, ſometimes *per curiam* or *in curiâ parliamenti*, ſometimes *per magnates et proceres &c.* And this ordinarily done at this day by majority of votes; which yet notwithſtanding hath been found a great inconvenience. For though the lords ſpiritual be learned men in their way; and though the temporal lords are uſually of a noble extraction and generous education, and poſſibly well acquainted with the methods of government; yet it is impoſſible they ſhould be ſkilled in judicial proceedings and matters of law, which requires great ſtudy and experience to fit perſons thereunto. And beſides many of them are young and unacquainted with buſineſs, eſpecially of this nature; many of them may be abſent, and commit their proxies to others. So that certainly it is a great inconvenience, that mens eſtates and intereſts, and the judgments of learned judges given with great deliberation and advice, ſhould be ſubject to be ſhaken, and it may be overthrown, by, it may be, one ſingle content or not content. Whatever the extraction of men be, yet they are not born with the knowledge of the municipal laws of a kingdom, nor can be ſuppoſed to be inſpired with the knowledge of the law by the acqueſt or deſcent of a title of honour.

And this was well known and obſerved by the king and nobility and wiſe councillors of antient times. And therefore there were proviſional remedies for this inconvenience in the judicatory in the houſe of lords.

1. It ſhould ſeem, that in antient times theſe proceedings, eſpecially in writs of error, in parliament were for the moſt part if not altogether tranſacted by the *conſilium regis ordinarium*, the chancellor, treaſurer, juſtices, barons of the exchequer, and thoſe whoſe education and experience rendered them more fit for ſuch employment; and rarely did theſe matters come into the houſe of lords for their

deciſion, unleſs it were in caſes of great moment concernment and example.

2. WHEN they came to the houſe of lords upon ſuch an account, it ſeems, that antiently even the *conſilium regis ordinarium*, the chancellor treaſurer and juſtices, had not only a voice of advice, but alſo of ſuffrage: as appears by what hath been before delivered, and by the inſtance of the ſtatute of 14. *E.* 3. that erected a court for remedying delays in judicial proceedings, conſiſting of lords ſpiritual, lords temporal, chancellor treaſurer and judges, wherein the judges had a coordinate voice as well as the lords, as appears by the ſtatute itſelf: and as likewiſe appears by the compoſure and power of the *auditores querelarum* appointed by the king in parliament; which conſiſted as well of the chancellor treaſurer and juſtices, as of lords, and their power not only preparative to the houſe of lords but deciſive, as appears before in this tract.

3. BUT yet further it is moſt evident beyond all diſpute, that though the record either by writ or petition were removed into the lords houſe, and virtually and interpretatively the judgment of affirmation or reverſal was theirs; yet the actual deciſion and determination (in antient times even after the decay of the power of the *conſilium regis)* was given by a ſelect number of lords and judges, nominated by the king in parliament, or at leaſt by the king with the advice of the lords.

THIS appears by the Year Book of 22. *E.* 3. 3. upon a petition of error by Hadelow and his wife in parliament upon a judgment given in the king's bench. The words of the book are,—NOTA *que petition fuit ſue al roy devant ceo que le breif fuit graunt. Pur que le roll, en que le proceſſe et jugement furent, fuit port en parlement par ſir William Thorpe. Sur que le roy aſſigne counts et barons et oveſque eux les juſtices, &c. de terminer les dites beſoignes. Et devant ceo que riens fuit fait, le parlement fuit fini, et les deputyes demeurrent, mes le roy*

roy meme fuit ale; devant queux fuit dit, que le jugement ne poet eſtre revers ſi non en parlement; et depuis que ceo eſt fini, ULTERIUS *en ceſte beſoigne* NIHIL AGENDUM.

HIL. 2. *E.* 3. *rot.* 96. *coram rege.* Diverſe of the inhabitants of Lemington brought a petition of error of a judgment given for the king againſt the mayor bailies and men of Lemington in the exchequer 17. *E.* 2. The record and proceſs were removed into parliament, and ſent *ſub pede ſigilli* by *mittimus* to the juſtices of the king's bench by the king's mandate, *quòd viſis et examinatis recordo et proceſſu et petitione prædictis, vocatiſque coram eis evocandis, et auditis hinc inde rationibus partium, ulterius ad errores prædictos, ſi qui fuerint, fieri facerent, quod de jure foret faciendum.* And now upon complaint by the petitioners of delay in the judges, a writ iſſued to the juſtices of the king's bench to proceed to the determination of the errors: whereupon the juſtices of the king's bench affirm the judgment, and accordingly gave judgment of affirmation, and execution is made in the king's bench.

ROT. *parl.* 7. *R.* 2.* *n.* 20. *et ſequentibus* in the caſe of the petition of error by the prior of Mountegne againſt Richard Seymor, directed to the king and lords in parliament, he prays, *que ordonne ſoit en ce parlement, que certains gents de councell le roy ſoient aſſignes, devant queux le record ſoit envoy; et q'ils eient poiar par force de cette ordinaunce pur examiner les erreurs;* and to warn Seymor to appear before them *ad audiendum errores; et que eux poient corriger et redreſſer les erreurs.* And thereupon *par aſſent de parlement* a *ſcire facias* was ordered to iſſue againſt Seymor, *d'eſtre al prochein parlement ubicunque,* and that the record be then brought into parliament, and that no protection be allowed. And accordingly *rot. parl.* 8. *R.* 2. *n.* 15. the *ſcire facias* was returned, and the errors examined, *et videtur curiæ parliamenti, quòd erraverunt.* The judgment was reverſed, *et in pleno parliamento præceptum eſt cancellario, quòd faciat executionem.*

* The roll meant to be referred to is *part.* 2. of the 7. *R.* 2.——F. H.

THIS

THIS ſhould ſeem to be a proceeding *in pleno parliamento*, though the record were removed to the lords houſe and the petition was to the king and lords. So that, although the deſire of the prior to have the errors examined by ſome perſons of the council thereunto aſſigned was not obſerved, but the proceeding was altogether in the parliament; yet this prayer of his makes it appear, that it was the uſual courſe in writs of error in parliament to have the errors examined by ſome ſelect perſons of the king's council thereunto appointed by the king, or at leaſt by the king and lords or with their aſſent conſonant to the book of 22. *E.* 3.

AND poſſibly if this courſe were held, it would be not only a great diſpatch of buſineſs of this nature; but alſo would avoid thoſe many inconveniencies, which ariſe by determining of errors and matters in law by the majority of voices, where it may be, that one fifth part of them that give the judgment are wholly ſtrangers to the courſe of law and of judicial proceeding.

IT is true, the courſe abovementioned is now grown much out of uſe, and the lords give the judgment themſelves. But yet even therein ſince the time that the whole deciſion of errors have been practiſed in the houſe of lords by their votes, the judges have been always conſulted withal, and their opinion held ſo ſacred, that the lords have ever conformed their judgments thereunto, unleſs in caſes where all the judges were parties to the former judgment, as in the caſe of ſhip money.

THIS appears by very many inſtances, ſome whereof are given before, CHAP. * . In the book of 1. *H.* 7. 19. *quam cito billa ſic indorſata fuerit, et breve de errore et tranſcriptum prædicta in parliamento deliberentur, clericus parliamenti habebit cuſtodiam inde, et per dominos tantùm, et non per communitatem, aſſignabitur ſeneſcallus, qui cum dominis ſpiritualibus et temporalibus* PER CONSILIUM JUSTICI-

* See before, CHAP. IX. and page 59.—F. H.

ARIORUM

ARIORUM *procedent ad errorem corrigendum.* And therefore when after errors aſſigned the plaintiff being in execution deſired to be bailed, it is anſwered *per adviſamentum omnium juſticiariorum*, that it could not be; for then if the parliament were diſſolved before judgment, the party ſhould be at large and the plaintiff below without remedy.

AND he, that conſiders the great reverence that hath been in all caſes of law given to the reſolution and opinion of the judges by the lords in parliament, and how conformable regularly the judgment of the lords hath been to the opinion and advice of the judges upon matters in law tranſacted in the houſe of lords, and how the ſtatute of 14. *E.* 3. joins the advice of the judges to the lords and biſhops commiſſionated for redreſſing delays in judgment, will find, that though for many years laſt paſt they have had only voices of advice and aſſiſtance not authoritative or deciſive; yet their opinions have been always the rules, whereby the lords do or ſhould proceed in matters of law, eſpecially between party and party; unleſs the caſes be ſo momentous, that they are not fit for the determination of judges; as in queſtions touching the right of ſucceſſion of the crown, *rot. parl.* 39. *H.* 6. * or the privileges of parliament, *rot. parl.* 31. *H.* 6. † or the great caſes that concern the liberties and rights of the ſubjects in general, as in the caſe of ſhip money and ſome others of like univerſal nature.

* *Rot. parl.* 39. *H.* 6. *n.* 12.—F. H. † *Rot. parl.* 31. 32. *H.* 6. *n.* 26.—F. H.

CHAP.

CHAP. XXVIII.

CONCERNING THE MANNER OF EXECUTION OF JUDGMENTS OF AFFIRMATION OR REVERSAL UPON WRITS OR PETITIONS OF ERROR IN THE LORDS HOUSE.

IF the judgment were affirmed or reverſed in parliament, the ancienteſt courſe for the execution of ſuch judgment was by remanding the record into the court where that judgment was given, viz. into the king's bench, with a mandate to the juſtices to iſſue execution accordingly, which was accordingly there done. *Vid. accordant T.* 31. *E.* 1. *coram rege rot.* . And accordingly in the reverſal of the attainder of Mortimer earl of March, which was done by the king lords and commons, *rot. parl.* 28. *E.* 3. *n.* 8. the record of the reverſal and reſtitution was ſent by writ under the great ſeal into the king's bench, with a command to iſſue writs of *ſcire facias* to the ter-tenants for the earl's reſtitution to his lands, which was accordingly done in the king's bench.

BUT in after times they uſed ſometimes another method of executing their judgments of affirmation or reverſal, but eſpecially of the latter, viz. becauſe the chancellor or keeper of the great ſeal was conſtantly with this ſeal attending in parliament, the houſe of lords by their order uſually commanded the chancellor to make execution of the judgment by writ under the great ſeal; which it ſeems was returnable in chancery, becauſe the parliament might be diſſolved or adjourned before the writ could be executed or returned.

THUS *rot. parl.* 8. *R.* 2. *n.* 15. the prior of Mountegne recovered a rent in the common bench; that judgment was reverſed in the king's

king's bench; and again the judgment of reverſal was reverſed in parliament, and that the prior ſhould have reſtitution of his annuity and of the arrears. And thereupon it is commanded to the chancellor *in pleno parliamento*, that he iſſue a writ under the great ſeal to the ſheriff of Somerſet, where the lands charged lay, *quòd tam de ſeiſinâ et reſtitutione, quàm de exitibus perceptis, ſecundùm legem et conſuetudinem regni, plenam executionem fieri faciat.*

ROT. *parl.* 2. *H.* 4. *n.* 27 upon the reverſal of a judgment given in parliament againſt Burgh and Holt, a writ of reſtitution iſſued under the great ſeal to the ſheriff of Somerſet, where the lands lay.

BUT at this day, if a writ of error be brought in parliament upon a judgment in the king's bench, if the writ abate by death, a record is made of it in the lords houſe, and by judgment the writ is there abated, and the judgment of abatement is entered upon the tranſcript left in the lords houſe, and the ſame is remanded into the king's bench to proceed according to law. *H.* 22. *Car.* 1. *B. R. rot.* 696. Trowl and Methurſt.

So if the judgment be affirmed by the lords, the judgment of affirmation is entered upon the tranſcript, and a *remittitur* entered thereupon, and the record delivered back to the king's bench to proceed with execution. *T.* 26. *Car.* 2. *rot.* 807.

AND ſo if the judgment be reverſed by the lords, the judgment of reverſal is entered upon the tranſcript with a *remittitur* in this form. *Et ſuper inde recordum & proceſſus per curiam parliamenti curiæ domini regis coram dicto domino rege ubicunque, &c. remittuntur; et in eâdem curiâ coram dicto domino rege jam reſident.* *M.* 24. *Car.* 2. *B. R. rot.* 237. Streter's caſe.

AND it ſeems, that although as to ſome purpoſes the record was removed from the king's bench into the parliament; yet really the record remains as to many purpoſes in the king's bench; and after ſuch a *remittitur* the court of king's bench proceeds upon the original record before them, and enters the reverſal and *remittitur* upon that record.

THEREFORE if the parliament be diſſolved before any judgment of affirmance or reverſal, upon a ſuggeſtion thereof upon the roll in the king's bench, the court of king's bench ſhall proceed upon the record before them, though there be no *remittitur* of the tranſcript out of the parliament into the king's bench.

A JUDGMENT is given for the defendant in the huſtings of London in an action of waſte, where it ſhould have been given for the plaintiff. That judgment is reverſed by writ of error before commiſſioners at Saint Martin le Grand according to the caſe. Error was thereupon brought in parliament, and the laſt judgment affirmed. The parliament is adjourned before any execution made. The plaintiff, to have his execution, removed the tenor of the record of the affirmation into chancery by *certiorari* directed to the clerk of the parliament; and thence it was ſent into the king's bench by *mittimus* under the great ſeal commanding that court to proceed to execution, which was accordingly done in the king's bench by *ſcire facias* about 23. *Car.* 2. in Cole's caſe of Gray's Inn.

CHAP.

CHAP. XXIX.

CONCERNING SUPERSEDEAS BY WRITS OF ERROR IN PARLIAMENT, AND CONTINUANCES BY ORDER PROROGATION OR ADJOURNMENT.

WE are to know, that the lords houſe may be conſidered as a court by itſelf without the commons, or as a conſtituent part of the parliament together with the commons. In the former conſideration it proceeds in points of judicature belonging to their ſeparate juriſdiction as a diſtinct court of itſelf; as in writs of error, and ſome other points of juriſdiction before mentioned belonging thereunto. In the latter conſideration it proceeds on the legiſlative power, paſſing of acts, which cannot be without the conſent of the king lords and commons; and this is indeed the ſupreme court of parliament, the *commune conſilium regni*.

As the parliament hath its beginning by the king's writ of ſummons under the great ſeal; ſo it hath its prorogation and continuances by the like writ ordinarily.

WE are to obſerve theſe ſeveral methods of continuances of the parliament, or of either houſe thereof, or of the buſineſſes depending therein.

(1.) THERE are continuances of particular cauſes depending in the lords houſe during the ſeſſion of parliament, much like the continuances in other courts, by *dies dati*, or orders of continuances of particular cauſes.

(2.) THERE are adjournments and continuances of each houſe of parliament by their own adjournments. This doth not determine, or put without day, or diſcontinue, any buſineſs depending in either houſe by bill, by petition, or in the lords houſe by writ of error, or otherwiſe.

(3.) THERE are prorogations by the king's writ of prorogation after the ſummons and before the day of ſeſſion appointed by the writ of ſummons unto ſome other day, and ſometimes to ſome other place, as *clauſ.* 12. *H.* 6. *m.* 15. *dorſ.* from Lincoln to Weſtminſter. Sometimes it is to ſome farther day and place, as in frequent inſtances: the writ of prorogation reciting the former ſummons at a day to come, and ſometimes the cauſe of prorogation, ſometimes only *certis de cauſis.*—The operative words are only *parliamentum prædictum uſque* ſuch a day *duximus prorogandum, per quod ad dictum diem et locum prædictum accedere vos non oportet iſtâ vice,* with a command to appear at the day given by the prorogation. And ſometimes it is prorogued till a new ſeſſions, which in effect is a diſſolution of the former ſummons. Thus *clauſ.* 22. *E.* 3. *part.* 2. *m.* 17. *dorſ.* the parliament was ſummoned to be held at Weſtminſter *die lunæ poſt feſtum ſancti Hilarii*; then *clauſ.* 22. *E.* 3. *part.* 2. *m.* 3. *dorſ.* prorogued to *quindenam paſchæ* next by reaſon of the plague by writ bearing teſt 1. *Jan.* 22. *E.* 3. and then *clauſ.* 23. *E.* 3. *parte primâ m.* 19. *dorſ.* by writ bearing teſt 10. *Martii* prorogued *uſque ad novam præmonitionem per nos inde faciendum.*—Thus the writs run, that were directed to the lords.—But the writs directed to the ſheriffs run as before to the words *prorogandum*; and then *per quod milites cives et burgenſes, quos adveniendum ad dictum parliamentum ad dictam quindenam tenendum per te ſummoneri præcipimus, ad locum prædictum ad eandem quindenam accedere non oportet, quouſque de mandato noſtro de novo fuerint præmoniti; et ideo tibi præcipimus, quòd executioni dicti mandati noſtri devenire faciendo hujuſmodi, milites cives et burgenſes ad dictum parliamentum ad quindenam prædictam faciendum omnino ſuperſedeas.*

BUT

BUT there was no reſummons of thoſe that were formerly elect, but an entirely new parliament ſummoned. *Clauſ.* 24. *E.* 3. *part.* 2. *m.* 3. *dorſ.* The like *clauſ.* 5. *E.* 2. *m.* 17. *dorſ.*

I FIND two extraordinary kinds of writs relating ſomewhat to the matter of prorogation, viz.—*Clauſ.* 28. *E.* 1. *m.* 2. & 3. *dorſ.* whereby after the former parliament diſſolved there was a reſummons of the ſame knights citizens and burgeſſes to a new parliament. This was accordingly *de facto* done, and the parliament accordingly ſat: but it was irregular and not agreeable to law, and therefore was never after practiſed.—*Clauſ.* 17. *H.* 6. *m.* 1. *dorſ.* a parliament was ſummoned *in quindenâ Michaelis*; and after by writ bearing *teſte* 3. Auguſt, entitled *de abbreviatione parliamenti*, reciting the former ſummons, *nos tamen certis de cauſis urgentibus, &c. diem parliamenti prædicti duximus abbreviandum, et parliamentum noſtrum apud palatium noſtrum Weſtmonaſterii in craſtino ſancti Matthæi apoſtoli proximè futuro teneri ordinavimus*; and a command to the peers, &c. to attend accordingly, which was accordingly then held.

(4.) THERE are adjournments of parliaments by the king after they are begun and held. Theſe are oftentimes called prorogations, and the word *prorogandum* was ſometimes uſed therein.

CLAUS. 21. *R.* 2. *m.* 19. *dorſ.* The writ recites the ſummons of parliament holden *die lunæ poſt feſtum ſanctæ crucis ultimo præterito pro quibuſdam arduis et urgentibus materiis et negotiis in eodem parliamento adtunc pendentibus, quæ adhuc commodè terminari non potuerunt, dictum parliamentum uſque quindenam ſancti Hilarii proximè futuram apud Salop in ſtatu quo tunc fuit duximus prorogandum et continuandum: vobis præcipimus* to attend at that day and place, *veſtrum conſilium impenſuris, et inde abſque licentiâ noſtrâ non receſſuris, teſte rege quinto Novembris.*

AND

And indeed it is frequently in records ſtiled a prorogation; though it is but an adjournment. *Vide rot. parl.* 27. *H.* 6. *n.* 12. But this hath been altered of latter times.

In the point of adjournment theſe things are obſervable.

1. The adjournment of the parliament is by the king, or the king's commiſſion to adjourn the parliament; and this is done in the houſe of lords, ſometimes and moſt commonly the commons being called up and preſent, and ſometimes only done in the lords houſe and notified to the commons in their houſe.

2. Though there may ſometimes iſſue a writ to call the lords to the parliament, as was done in the caſe of 21. *R.* 2. beforementioned; yet in truth the effective and operative adjournment is the king's declaration, being preſent by the mouth of the chancellor, or if abſent then by the commiſſioners. And thus it was done *rot. parl.* 21. *R.* 2. *n.* 36. which is the foundation of the writ abovementioned to notify it.

3. Though it be ſometimes called a prorogation in the very record of adjournment; yet in truth and propriety of ſpeech it is no prorogation; for that is *before* the day of ſeſſions by the ſummons, but adjournment is *after* the ſeſſions begun. And the records of the commiſſion to adjourn have therefore of latter times omitted the word *prorogandum*, and run only thus: *præſens parliamentum et omnia negotia cauſas et materias inceptas et non adhuc terminatas adjurnare et continuare uſque talem diem ibidemque tunc tenendum et proſequendum.*

Now in relation to theſe various continuances ſomewhat is obſervable touching parliamentary proceedings in both or either of the houſes. It ſeems therefore,

1. That

1. THAT the private adjournments of the houſes by themſelves make no alteration or diſcontinuance of ſuits in the lords; no, nor of their committees or bills.

2. A PROROGATION before a ſeſſion doth not diſcontinue a writ of error, nor a *ſcire facias* thereupon, but carries it over to the day given by prorogation.

3. AN adjournment of the parliament by the king, or by his commiſſion, in ſuch manner as is above declared, what effect it hath, was a buſineſs formerly of great debate: but now it is by uſe and cuſtom and partly by declarative orders ſettled.—1. As to writs of error and cauſes depending there as a ſeparate court from the commons, heretofore it was held, that an adjournment without ſpecial words to adjourn all cauſes *in ſtatu quo* had diſcontinued all ſuch proceedings in the lords houſe, and they were put to begin all again. And thus I remember it was ruled in the houſe, Bridgeman being keeper. But ſince that time upon ſearch of precedents it hath been ordered and declared by the lords, that no diſcontinuance ariſeth in ſuch caſes by adjournment, but they are to proceed as they left the cauſe the laſt ſeſſion. And truly it ſtands with reaſon; for theſe proceedings are in the lords houſe as a diſtinct court.—2. But then what ſhall be done as to bills or acts depending in either houſe? In the parliament of 18. *Jac.* Coventry then attorney reported, that upon ſearch he found not the word *proroguing* in ſuch adjournments; and therefore May 31. in that parliament reported, that ſuch an adjournment determines committees, but not bills. But this report of his hath not obtained; for it is the conſtant uſe after ſuch adjournments by the king or by his commiſſion, that all bills and matters relating to both houſes do begin *de novo*, as well as committees. And it ſtands with reaſon: for this is a proceeding before them, as both houſes conſtitute one court and alſo a great council wherein there may be many changes of advices as well as perſons.

BUT

BUT if the parliament be diſſolved before judgment affirmed or reverſed, then the writ of error is wholly diſcontinued and abated, and the court below may iſſue proceſs and execution upon the record remaining with them, without any formal remiſſion of the tranſcript from the houſe of lords, upon a ſuggeſtion entered thereof upon the record before the judges below, that the judgment is neither affirmed nor reverſed.

AND therefore I take it, that the granting or continuing of a *ſuperſedeas* by the lords houſe, depending a writ of error, until the next parliament, as it hath been ſometimes done, viz. *rot. parl.* 4. *H.* 4. *n.* 26. in the caſe of the dean and chapter of Litchfield, *rot. parl.* 11. *H.* 6. *n.* 40. in the caſe of Iſabel Beauchamp, was not conſonant to law. For it would be an intolerable delay of juſtice; for no parliament poſſibly would be ſummoned in ſeven years; and it were very unreaſonable, that the plaintiff's execution upon a judgment obtained ſhould be ſo long delayed: and the rather becauſe error in judgments is not preſumed, till it be declared and adjudged by the court where a writ of error is depending.

BUT if it were only an adjournment of the parliament to a long day, there, according to the reaſon of the reſolution of the lords abovementioned, as the writ of error hath a continuance until the day given by adjournment, ſo the *ſuperſedeas* will alſo have a continuance notwithſtanding ſuch adjournment of the parliament.

A WRIT of error regularly is not to be brought or ſued out of record, till a parliament be actually ſummoned; for it muſt have a certain return; and the like of a *ſcire facias* upon a writ of error brought and errors aſſigned in parliament; for to bring a writ of error returnable *ad proximum parliamentum* generally is not regular, nor will be any *ſuperſedeas* for the reaſon before given. But the writ of error is to be brought after the parliament ſummoned, and is to mention

mention the day and place of the parliament ſo ſummoned. Thus it was agreed by the court of king's bench.

AFTER an adjournment or prorogation of the parliament a writ of error may be brought, and is to be allowed; becauſe there is a fixed day of reconvening it; but with this difference. If the day given by adjournment or prorogation be a ſhort time after the iſſuing of the writ of error, it is then alſo a *ſuperſedeas* to the court below to grant execution; as if for the purpoſe the writ bears teſt in Trinity term, and the day of adjournment or prorogation be in the next term, viz. any time in Michaelmas term; becauſe here no mean term intervenes. And accordingly this holds upon writs of error in the exchequer chamber or king's bench. But if a term intervenes between the teſt or allowance of the writ of error and the day of adjournment of the parliament; as if the writ comes to be allowed in Trinity term, and the day of adjournment of the parliament, when the writ of error is returnable, is in Hilary term; this is no *ſuperſedeas* of the execution (but yet the writ of error muſt be allowed) for the great delay that would happen, to thoſe that have had their judgments, by the interpoſition of a term. And this I have known many times ruled, as well upon writs of error in parliament, as upon writs of error in the exchequer chamber.

AND this caſe differs from that before mentioned, where the parliament is adjourned or prorogued either to a ſhort day or long day after the record removed, *and a long day upon the writ of error before the record removed* *: for in the former caſe the court of parliament is poſſeſſed of the record, but not in the latter caſe.

* The words in *italic* want addition to make the ſenſe compleat. But the difference meant to be pointed out is between removal of the record *after* adjournment or prorogation and removal *before*.——F. H.

CHAP. XXX.

SEVERAL INSTANCES OF WRITS OF ERROR, AS THEY OCCUR IN THE PARLIAMENT ROLLS FROM THE BEGINNING OF *E.* 3. TO 1. *H.* 7.

I SHALL now, as I promiſed, give an account of the ſeveral writs or petitions of error in parliament from the firſt year of Edward the third to the beginning of Henry the ſeventh, and the brief memorial of them, and ſome obſervations thereupon; which will both explicate and prove much of what hath been before delivered upon this ſubject.

I SHALL omit thoſe of the earls of Lancaſter and biſhop of Hereford; becauſe mentioned at large *ſupra* CHAP. * and begin about 4. *E.* 3.

† 4. *E.* 3. *n.* 1. 2. & 3. Attainder of Roger Mortimer and Simon Beresford for the death of *E.* 2. and of John Matravers for the earl of Kent.—N° 6. *Declarations des ſeigneurs en plein parlement, que lour jugement ſur Simon Beresford et autres, que ne fuerent lour peres* NON TRAHATUR IN CONSEQUENTIAM, *par quoi les dits peres puiſſent eſtre charge deſore adjuger autres que lour peres contre le ley de terre, ſi autiel caſe aveigne.*

N° 11. & 12. Petition of error by Eſmon ſon and heir of Eſmond earl of Kent upon the attainder of his father. The like by his widow. But it ended in a reſtitution by the king *par aſſent du parlement.*

* See before, CHAP. XXII. page 128. See alſo page 172. and 173.—— F. H.

† The remainder of this chapter is not in lord Hale's own hand-writing, but ſeems to have been tranſcribed by ſome perſon employed by him as an amanuenſis.—F. H.

N° 13.

N° 13. The like for Richard earl of Arundel, but no reverſal, becauſe the attainder was confirmed in parliament, but a reſtitution *par aſſent de parlement.*

21. *E.* 3. *n.* 56. *vel* 65. John Matravers *ſuiſt petition al roy et a ſon councel d'error, que le jugement ſoit veiu et examine en plein parlement devant roy et peres de realme. Nihil factum; ſed poſtea reſtitution,* 25. *E.* 3.

25. *E.* 3. *n.* 54. *Reſtitution de John Matravers par roy ſeigneurs et commons.*

N° 9. *Reſtitution de count de Arundel par roy ſeigneurs et commons.* The petition *al roy et councel en preſent parlement.*

ROT. *parl.* 28. *E.* 3. *n.* 8. Eſmon ſon and heir of Mortimer petitions the king, that the record of his father's attainder *ſoit fuit vener devant vous et les peires de la terre,* that the errors therein may be examined and corrected, and right done. *Par vertue de quel peticion le roy fiſt vener devant lui et le prince et duc de Lancaſter, countes, barons, et peres de la terre, les chivalers des countees et totes les autres commons illoque aſſembles, le record et judgment,* which is there entered, viz. that in the parliament of 4. *E.* 3. he aſſigns error, that he was adjudged to death without being put to anſwer. *Et ſur ce eue bone deliberacion par le roy, prince duc prelates countes et barons, il appeirt clerement, que le judgement eſt erroneous, par quoi le roy, et les prelates prince duc countes et barons, par accord des chivalers des countees et des dits communes, repellont et pur erroneous adjugent le record et judgement ſurdit, et agardent reſtitution.*—This record was ſent by writ under the great ſeal into the king's bench; and there *ſcire facias* to be awarded.

IBID. *n.* 13. Richard earl of Arundel petitions the king, that the record of a ſtatute made 1. *E.* 3. by which Eſmond his father was

put to death be viewed and examined *devant lui et les peeres de la terre*, that he may be reſtored to the inheritance of his father. *Par vertu de quel petition le roy fiſt ſercher les recordes et remembrances touchant le mort Richard count de Arundel*, which was a recital in a ſtatute 1. *E.* 3. and entered *in hæc verba. Quel ſtatut veiu et entendu par notre ſeigneur le roy, prelates, prince de Gales, duc de Lancaſtre, countes et barons, peires de la terre, et chivalers des countees et totes autres communes de la terre, illoeque aſſembles, riens eſt compriſe forſque recital de ſtatut: et ſur ceo eue bone deliberation par notre ſeigneur le roy prelates prince duc countes et barons avantdits, il appeirt, que Eſmond count de Arundel fuit unduement mis al mort, &c. par quoi notre ſeigneur le roy prelates prince duc countes et barons, par aſſent des chivalers des countees et des dits communes ajugent la recitation, &c. erroneous et nuls*, and that Richard be reſtored, &c.

CLAUS. 1. *E.* 3. *part.* 1. *m.* 21. *dorſ.* * Henry brother and heir of Thomas earl of Lancaſter *venit in iſto parliamento, et exhibuit coram domino rege proceribus et magnatibus regni et conſilio ipſius regis tunc ibidem exiſtentibus petitionem*, "*A notre ſeigneur et a ſon councel prye Henry*," &c. that the record of his brother's attainder being in the chancery be examined and redreſſed. *Prætextu cujus petitionis dictum fuit cancellario per ipſum regem, quòd deportare faceret recordum et proceſſum in parliamento*; which was accordingly done and errors aſſigned. *Et quia inſpectis et plenius intellectis recordo et proceſſu prædictis, ob errores prædictos et alios in recordo et proceſſu, conſideratum eſt per ipſum dominum regem proceres et magnates et totam communitatem regni in eodem parliamento*, that the judgment *tanquam erroneum revocetur et adnulletur, &c. et habeat brevia cancellario et juſticiariis, in quorum placeis dictum recordum irrotulatur, quòd recordum prædictum irritari faciant.*

THE ſtile is *placita coram domino rege et conſilio ſuo in præſentiâ ipſius regis procerum et magnatum in parliamento.* 1. *E.* 3.

* See alſo *rot. parl.* 1. *E.* 3. *n.* 1.—F. H.

THE

THE like judgment for Roger Mortimer.—The like for the biſhop of Carliſle.

ROT. *parl.* 40. *E.* 3. *m.* 2. The proof of age and livery admitted *coram domino rege prælatis magnatibus et communitate regni Angliæ in parliamento.*

50. *E.* 3. *n.* 48. Complaint of biſhop of Norwich of erroneous judgment in *C. B. A quoi eſt reſpondu finalment par commun aſſent de touts les juſtices*, that it doth not lie till affirmance or reverſal in *B. R.*—*Nota*, the petition is not of record.

1. *R.* 2. *n.* 29. The earl of Saliſbury petitions the king for the reverſal of a judgment given againſt him in the king's bench for error, and prays the king *a commander faire vener le record et proces devant vous et votre tres ſage councel en ce preſent parlement*; and proceſs againſt Mortimer to hear the errors, &c. *Quel petition eue et entendue en meme parlement, commande fuit en ceſt parlement par les prelats et ſeigneurs peres de parlement a Johan Cavendiſh cheife juſtice, q'il ferra vener le record et proces entre rolls de divers autres records ſans delay*, who *apporta les record et proces en rolls de diverſes autres records.* The earl thereupon aſſigns errors by word of mouth, and prayed a *ſcire facias* againſt Mortimer returnable the next parliament, which is granted. At the end of the parliament the chief juſtice carries back the rolls; and it is ordered, that the record be brought into the next parliament. *Nota* the petition to the king, but tranſmitted to the lords, and thereupon the lords make theſe awards.—At another parliament, *rot. parl.* 2. *R.* 2. *part.* 1. *n.* 19.* the former record recited. The *ſcire facias*, accordingly reciting the petition, *nos ſupplicationi prædicti comitis annuentes recordum et proceſſum prædicta tam coram nobis quàm prælatis et magnatibus in dicto parliamento venire fecimus*; and command to the ſheriff of Salop, *quòd ſcire facias Edmundo*

* It ſhould be *part.* 1. *n.* 31.—F. H.

Mortimer,

Mortimer, &c. quòd ſit coram nobis in proximo parliamento ubicunque tunc fuerit auditurus recordum et proceſſum, &c. et ulterius facturus et recepturus quod conſiderari contigerit tunc ibidem. Teſte 1. *Decemb.* 1. *R.* 2. NOTA, the former parliament ended 28. Novemb. 1. *R.* 2. This parliament held 25. May * 2. *R.* 2. So the *ſcire facias* iſſued after the end of the former parliament and before this of *R.* 2. ſummoned.—The ſheriff returned *nihil habet.* The earl petitions the king for a new *ſcire facias* returnable the next parliament *in totidem verbis* as the former. Mortimer returned ſummoned. The parties appear. Exception taken to the return; and the earl prays, *a notre ſeigneur le roy et al ſeigneurs de parlement*, that he may aſſign errors, and that the record may be examined and reverſed. *Par aſſent du parlement jour eſt done al parties tanque prochein parlement. Rot. parl.* 2. *R.* 2. *part.* 2. *n.* 31.† This parliament began *die Mercurii* 20. *Octob.* 2. *R.* 2. ‡ The former proceedings of the earl of Saliſbury recited; a new *ſcire facias facias* prayed; *quel brief par notre dit ſeigneur le roy par adviſe des ſeigneurs et autres ſages de parlement eſt graunt returnable prochein parlement, et que les record et proces ſoient en dit prochein parlement.* NOTA, this ſeems to be the ſecond *ſcire facias* abovementioned.

§ [2. *R.* 2. *part.* 1.] *n.* 36. 37. Alice Peres || judged in parliament brought a petition of error. She could not purſue it by attorney without the king's licence. Licence is granted by the king. The bill is indorſed by the king, and *envoy a ſon grand councell en parlement, a queux le roy ad commiſe la diſcuſſion de meſme bill:* which bill *eſtoit puis apres par meſme le grand councel en plein parlement, par auctoritée a eux done par le roy, reſpondue et endorſée, &c.* "*il ſemble as*

* It ſhould be 20. October.——F. H.

† It ſhould be *n.* 19.——F. H.

‡ It ſhould be 25. April.——F. H.

§ What is between the crotchets not in the original; but neceſſary in point of reference.——F. H.

|| In the printed roll of parliament the name is *Perriers* and *Perrers.*——F. H.

" *ſeigneurs* * *de councell noſtre ſeigneur le roy, que le roy le poet faire de ſa* " *grace. Pur quoi il eſt aſſentuz, que les ſuppliantz ſoient reſceuz a* " *purſuer la ley par leur attournes.*"

ROT. *parl.* 3. *R.* 2. *n.* 19. This parliament held Monday after the feaſt of Saint Hilary 3. *R.* 2. There the whole record and continuance of the proceeding of the earl of Saliſbury in parliament are again repeated, and the continuance thereof is made to this that was the next parliament. It is commanded by the king *et autres ſeigneurs avantdits*, that the record and proceſs be brought in and read. But now Mortimer earl of March hath the king's protection *per unum annum duraturam*, and ſo the plea put without day.

ROT. *parl.* 7. *R.* 2. *n.* 20. A judgment given in the king's bench for Richard Seymor againſt the prior of Mountegne in a *ſcire facias*.—Firſt, the prior delivers a petition *al roy et al ſeigneurs en ceſte parlement*, that a judgment *quòd reſpondeat ouſtre* given againſt the prior omitted to be entered of record by the juſtices may be entered.—The record brought into parliament *par commandment des ſeigneurs*, and the record viewed and examined in preſence of the lords and the juſtices *de utroque banco* and barons of the exchequer. *Et par adviſe des juſtices et autres ſages eſt agardez et commandez en parlement, que l'enrolment ſoit amendez*; and the old rolls taken out of the bundle and new-amended rolls inſerted.—The enrolment being amended by the ſaid award in parliament, a petition of error is brought by the prior directed *al roy et al nobles ſeigneurs en ce preſent parlement*; and it prays, *que ordeine ſoit en ce preſent parlement, que certains gents de councell le roy ſoient aſſignes, devant queux le record ſoit envoy, et q'ils eint poiar par force de ce ordinance* to examine the errors, and warn Richard Seymor to appear before them *ad audiendum errores*, and to redreſs the errors. *Quel bill lu en parlement eſt agard par aſſent de par-*

* What follows is in the original imperfect; and is therefore taken from the printed roll of parliament.—F. H.

lement,

lement, that the prior ſhould have *ſcire facias* returnable next parliament to warn Richard Seymor *ad audiendum errores, et ulterius facturum et recepturum ce que par ley de terre ſera adjuge en ce cas*, and that the record and proceſs be in the next parliament, and no protection to be allowed.—*Rot. parl.* 8. *R.* 2. *n.* 15. In the parliament held at Weſtminſter *craſtino Martini* 8. *R.* 2. the proceedings at the former parliament are recited. A *ſcire facias* iſſues to the ſheriff of Somerſet *teſte* 15. *October* 8. *R.* 2. *per petitionem de parliamento. Quòd ſcire facias Richardo Seymor, quòd ſit coram nobis in parliamento apud Weſtmonaſterium in craſtino Martini proximè futuro ad audiendum recordum et proceſſum et errores, &c. ſi ſibi viderit expedire, et ulterius ad faciendum et recipiendum quod curia noſtra conſideraverit in hâc parte.* This writ iſſued not till the new parliament was ſummoned and agreed. *Scire feci* returned. The petitioners appear. *Et præceptum eſt per regem et dominos in eodem parliamento* to the chief juſtice to bring the record *in dictum parliamentum*, which was forthwith done accordingly, and entered *in hæc verba*. Thereupon the prior aſſigns ſeveral errors; and to every material error aſſigned the court gives their opinion, viz. *et ſuper hoc auditis allegationibus utriuſque partis, et viſis et examinatis recordo et proceſſu prædictis,* * *ideo ob errores illos conſideratum eſt, quòd judicium prædictum tanquam erroneum revocetur ceſſetur et penitùs adnulletur*; *et quòd prior* ſhould have reſtitution *unà cum exitibus, &c. Et præceptum eſt vicecomiti Somerſet reſtitutionem et ſeiſinam de manerio prædicto, &c. et quòd inquirat de exitibus, &c. Et præceptum eſt cancellario domini regis in* PLENO PARLIAMENTO, *quòd tam de ſeiſinâ et reſtitutione, &c. quàm de exitibus, &c. ſecundùm legem et conſuetudinem regni Angliæ plenam executionem fieri faciat et demandet.* NOTA the command of reſtitution *en* PLEIN *parlement*, which appears to be both houſes preſent, as appears *rot. parl.* 10. *R.* 2. *n.* 35.

* In the printed roll the following words of judgment are preceded with an opinion upon each material error. *Rot. parl.* vol. III. page 194.—F. H.

THE

THE like 16. *R.* 2. *n.* 17. for John Frere.

ROT. *parl.* 13. *R.* 2. *n.* 16. Error in parliament by petition *al roy et ſeigneurs* by John Mothan for erroneous charging him as abettor in an *appel de mort* at 500 marks. The record brought into parliament: a *ſcire facias* thereupon awarded returnable *a prochein parlement a oyer les errours*, and to receive *ce que en le dit prochein parlement ſerra adjuge*, and that the record ſhould be there, and the petitioner's bail to pay the damages ſtated or render his body.

ROT. *parl.* 16. *R.* 2. *n.* 18. a petition of error by John Shepey upon a judgment in the king's bench directed *al notre ſeigneur le roy et al nobles ſeigneurs*, and praying *que pleſe al roy et al ſeigneurs, de faire vener le record en ce parlement, et a faire garnir le prior d'eſtre à ce parlement.* And *dictâ petitione in parliamento lectâ conſideratum eſt, quòd Johannes habeat breve de ſcire facias* returnable *proximo parliamento ad audiendos errores*, and *ad ulterius facturum et recepturum quod per legem terræ conſideratum fuerit in hâc parte*; and the record to be in the next parliament.—And now the writ abated *certis de cauſis*; and a new *ſcire facias* was granted returnable *ad proximum parliamentum.*

16. *R.* 2. *n.* 19. the like petition *al roy et nobles ſeigneurs* by Eſmond Baſſet. The petition continued till the next parliament *in ſtatu quo nunc.*

ROT. *parl.* 17. *R.* 2. *n.* 11. * *et ſequentibus* in this parliament held *in quindenâ Hillarii* a petition of error by the dean and chapter of Litchfield againſt the prior of Newport: *et dictâ petitione in parliamento lectâ de aſſenſu ejuſdem parliamenti conſideratum eſt, quòd habeant breve de ſcire facias* returnable *proximo parliamento, ad audiendum errores, et ad faciendum ulterius et recipiendum quod per legem terræ in eâdem curiâ parliamenti adjudicaretur in hâc parte; et quòd recordum et proceſſus præ-*

* N° 15. in the printed rolls.——F. H.

dicta ſint in proximo parliamento ex cauſâ prædictâ. The petition was *al ſeigneur le roy at a les nobles ſeigneurs de ce parlement.*—The *ſcire facias* iſſued 15. November 18. *R.* 2. returnable *coram nobis in parliamento noſtro in quindenâ Hillarii proximâ futurâ tenendo, ad audiendum recordum et errores, et ad faciendum et recipiendum quod curia noſtra conſideraverit in hâc parte,* which writ is then accordingly returned by the ſheriff.—This writ iſſued after the new parliament ſummoned. Thereupon *in eodem parliamento præceptum eſt capitali juſtitiario banci regis, quòd recordum et proceſſus prædicta in dictum parliamentum deferret:* which he accordingly did, and the record entered *in hæc verba.* The dean and chapter aſſign errors in parliament upon the judgment of reverſal given in the king's bench. *Super quo viſis et examinatis recordo et proceſſu prædictis, videtur curiæ in iſto eodem parliamento, quòd prædicti juſtitiarii ad placita coram rege tenenda aſſignati erraverunt: ideo conſideratum eſt in eodem parliamento, quòd judicium revocationis primi judicii redditi, &c. caſſetur et pro nullo habeatur.* And the firſt judgment in the common bench affirmed. *Et præceptum eſt in eodem parliamento cancellario domini regis, quòd faciat executionem. Intentionis tamen cuſtodis Angliæ et dominorum in eodem parliamento exiſtentium eſt, quòd decanus et capitulum habeant tantùm unum annuum redditum viginti librarum.* This judgment of reverſal was in the lords houſe. Yet the words of the whole proceeding are as applicable to the whole parliament, as that before of the prior of Mountegne. *Nota* this parliament held by the *cuſtos regni.*

1. *H.* 4. *n.* 90. Thomas Haxy's petition of error upon attainder of treaſon, *a noſtre ſeigneur le roy et a les ſeigneurs du parlement noſtre; et a quel petition ove record et proces d'icel lue et entendue, noſtre ſeigneur le roy par adviſe et aſſent des ſeigneurs ſpirituall et temporall ad ordein et adjuge, que le dit judgment rendu in parliament* 20. *R.* 2. *ſoit de tout caſſe revers et repeale, &c. et que le dit Thomas Haxy ſoit reſtore, &c.*

NOTA

NOTA *ibidem n.* 104. there was a bill for the reverſal delivered to the commons, and by them preſented *inter petitiones communitatis:* and the king anſwers, *le roy voet d'adviſe et aſſent de ſeigneurs ſpirituells et temporalls, que le judgment ſoit revers, ut ſupra.* So it paſſed as an act.

2. *H.* 4. *n.* 37. John Holt and William Burgh attaint in the parliament of 11. *R.* 2. petition the king *(al roy notre ſeigneur) de granter et adjuger, q'ils ſoient reſtores a leur terres, &c.* The record thereupon brought out of chancery *devant le roy et les ſeigneurs en parlement; et illoeque lue et entendue, error y ad apparent; pur que accord eſt par les ſeigneurs ſuſdits de aſſent le roy, que le record et judgement ſoient caſſes adnulles et reverſes, et les petitioners reſtores a leur terres unà cum exitibus.* And a writ to the ſheriff of Somerſet under the great ſeal to reſtore them to poſſeſſion *unà cum exitibus* *.

IBID. *n.* 38. *A roy notre ſeigneur* a petition of error by Eſmond Baſſet upon a judgment in *B. R.* given againſt him in *B. R.* for king *R.* 2. in a *ſcire facias, que pleſe al roy et les nobles ſeigneurs avantdits, a faire vener record et proces devant eux en ceſt preſent parlement, et a corriger les erreurs come ley et reſon demandent.* The record is accordingly removed, and continued *in ſtatu quo nunc* till the next parliament. The record is entered at large.

IBID. 39. *Al ſeigneur le roy et ſon tres ſage councel en preſent parlement ſupplie Roger coſin et heyre Simond de Burley, que pleſe a granter, que un judgement rendus envers Simond en le parlement* 11. *R.* 2. *ſoit revers et adnulle en ceſt preſent parlement. Aſſentuz eſt et accordez par le roy et les ſeigneurs en ceſt parlement, que le judgement envers Simond Burley ſoit revers et adnulle.*—NOTA *la petition al roy et councel, le*

* The printed roll of parliament is not in the ſame words of reverſal as are given here; and the reſtitution is ſilent as to profits of the lands, whilſt out of poſſeſſion of the two attainted perſons.——F. H.

reverſal par roy et ſeigneurs. But it was a ſpecial reverſal, and not to extend to certain lands granted to the free chapel of Saint Stephen.—*Vid.* more of this matter *rot. parl.* 5. *H.* 4. *n.* 54.

IBID. *n.* 40. Petition of error for the prior of Newport Pagnel. A *ſcire facias* granted and now returnable continued *in ſtatu quo* to the next parliament. *Et vide rot. parl.* 4. *H.* 4. *n.* 26. The error was brought upon the judgment of reverſal given 17. & 18. *R.* 2. in parliament. And now the errors aſſigned by the prior principally were, that a *ſcire facias* was granted in parliament before the record brought thither. *Sed nihil actum ulterius.*

6. *H.* 4. *n.* 61. * *A notre ſoveraigne ſeigneur et a ſeigneurs en ceo preſent parlement* the petition of Roger Deyncourt againſt a judgment given againſt him in a *ſcire facias* in *C. B.* and affirmed in *B. R.* upon a forged fine, *q'il pleſe a votre gracieus ſeigneurie et a votre tres ſage councell en ceſt parlement aſſemble,* to grant to the petitioner *de ſuer devant vous en ceſt preſent parlement et aillours par auctoritée d'icelle d'adnuller* the note of the fine, although *il ne ſoit party ou privy,* and that the record *ſoit envoy devant vous en parlement, et appellez devant vous et votre dit conſeil* the demandant *d'oyer et terminer les erreurs.* † RESPONSIO. *Pur eſchuir les perils et inconveniences, que purront advenir en ce cas, le roy par auctoritée du parlement voet aſſigner certeins ſeigneurs oveſque les juſtices, d'examiner la matire compriſe en ceſte petition: et ſur ce aient meſmes les ſeigneurs et juſtices poiar, par auctoritée ſuiſdite, de purvoer de remede en ce cas, come mieult leur ſemblera par leur ſages diſcrecions.*—NOTA the petition read, and the record brought into parliament.—NOTA this was a petition promoted by the commons as it ſeems ‡, and ſo in nature of a bill.

* See alſo *n.* 31. in the printed rolls of parliament.——F. H.

† The anſwer here given is from the printed roll of parliament; the extract in the manuſcript being imperfectly and inaccurately given.——F. H.

‡ See *n.* 63. of the printed roll of parliament of 6. *H.* 4.——F. H.

1. *H.* 5. *n.* 19. *A noſtre ſeigneur le roy et a les nobles ſeigneurs en ce preſent parlement* a petition of error by John Gunwardby upon a judgment in *B. R.* at the ſuit of John Windſor in a reverſal of an aſſize. *Pleſe al roy et ſeigneurs a faire vener record devant eux en ce preſent parlement, et a garnir Johan Windſor d'oyer le record le prockein parlement.* Then *ex præcepto domini regis de aſſenſu dominorum in eodem parliamento aſſiſtentium, capitalis juſticiarius detulit in hoc parliamento recordum et proceſſum prædicta; quibus recordo et proceſſu lectis et auditis et plenius intellectis in præſenti parliamento, necnon erroribus per prædictum Johannem Gunwardby allegatis, conceſſum eſt, quòd habeat ſcire facias verſus Johannem Windſor* returnable *in proximo parliamento, in quocunque loco teneri contigerit, ad auditurum recordum et errores prædictos, et ad faciendum et recipiendum ulterius quod* CURIA *parliamenti adtunc in hâc parte conſideraverit.*—NOTA better order now ſettled than formerly, viz. the record brought into parliament and read, and errors aſſigned and read, before any *ſcire facias* iſſued.—NOTA the *ſcire facias* returnable *proximo parliamento.*—NOTA lords houſe called *curia parliamenti.*—NOTA *rot. parl.* 2. *H.* 5. *part.* 2. *n.* 11. a parliament held *ultimo Aprilis* 2. *H.* 5. The *ſcire facias* bears teſt 18. Feb. 1. *H.* 5. returnable *in parliamento apud Lincolniam* ultimo Aprilis proximi futuri tenendo.* So it was not taken out till the parliament ſummoned.—NOTA it agrees *verbatim* with the award.

ROT. *parl.* 2. *H.* 5. *part.* 2.† *n.* 12. The earl of Saliſbury petitions *a notre ſeigneur le roy* for error in a judgment given againſt his father 1. *H.* 4. whereby he was attaint of treaſon after his death. It prays, *que le record et proces del judgement ſoient faits vener devant vous et les peres de terre* to examine errors. The record of the judgment and declaration is brought out of the chancery into the parliament, and the record entered *in hæc verba.* The earl aſſigns errors, and among others that the judgment was given by lords temporal

* It ſhould be *Leiceſtriam.*——F. H.

† In the printed rolls of parliament it is *part.* 1.——F. H.

only

only *de aſſenſu regis*, and without the aſſent of the commons, *queux de droit ſerront peticioners ou aſſentours de ceo que ſera ordein pur ley en parlement.* Continued to the next parliament. The judgment * given *rot. parl.* 2. *H.* 4. *n.* 30.—NOTA the judgment affirmed, *per dominos in præſenti parliamento de aſſenſu regis, quòd judicium verſus Johannem Comitem Sarum affirmetur. Rot. parl.* 2. *H.* 5. *part.* 2. *n.* 13. & 14. And *rot. parl.* 9. *H.* 5. *n.* 19. a ſpecial act of reſtitution.

3. *H.* 5. *n.* 19. Richard Caterman petitions *a noſtre ſoveraigne roy et tres nobles ſeigneurs en ce parlement pur erreur ſur jugement* in *B. R.* in treſpaſs, *que pleſe roy et ſeigneurs a commander cheif juſtice, de faire vener devant eux le record et proces, et de faire garnir* the plaintiffs in the action *par agard de meſme ceſt parlement d'eſtre al prochein parlement d'oyer les erreurs* which ſhall be aſſigned. *Quá quidem petitione in parliamento ipſo publicè lectâ, de aſſenſu ejuſdem parliamenti conſideratum eſt, quòd Richardus habeat breve de ſcire facias* returnable the next parliament, *ad audiendum errores, et ulterius recepturum quod per legem terræ in curiâ parliamenti contigerit adjudicari in hâc parte.*—NOTA IN PARLIAMENTO, DE ASSENSU PARLIAMENTI, and CURIA PARLIAMENTI. Yet all in the houſe of lords.

ROT. *parl.* 8. *H.* 6. *n.* 70. *Al roy et al ſeigneurs ſpiritual et temporal en ce parlement*, the petition of the prior of Lanthony againſt an erroneous judgment given in the parliament of Ireland in reverſal of a judgment in the king's bench in Ireland, becauſe the juſtices of the king's bench in England † *n'ont poiar a juger et terminer ceo que fuiſt fait en parlement d'Ireland.*

10. *H.* 6. *n.* 52. *A notre ſeigneur le roy ſupplie Johane de Beauchamp*, for error in a judgment againſt her for the king in a *ſcire facias* upon a recognizance. *Pleſe a vous a faire vener record et proces devant vous*

* That is, the judgment of attainder.—F. H.

† 1. *E.* 4. *n.* 15. 35.

en

en ce parlement, et illoeques par aſſent des ſeigneurs ſpirituall et temporall et par auctoritée de votre dit parlement corriger et amender the error. *Super quo præceptum eſt capitali juſticiario, quòd recordum et proceſſum in dictum parliamentum deferret,* which is done accordingly and entered *in hæc verba. Quibus lectis et auditis* ſhe preſently aſſigns her errors in writing. And *pro eò quòd curia parliamenti nondum adviſatur, ideo conſideratum eſt, quòd Johana habeat diem uſque proximum parliamentum, quòdque recordum* * *et proceſſus cum omnibus ea tangentibus in dicto parliamento continuè ſint parata, et interim ſuperſedeatur executioni.*—NOTA no *ſcire facias,* becauſe the king party only †.

* 1. *R.* 2. 87.

† It is obſervable, that though lord Hale at the beginning of this Chapter expreſſes an intention of extending his account of writs of error to the beginning of the reign of Henry the ſeventh; yet here he ſtops at the tenth of Henry the ſixth.——F. H.

CHAP.

CHAP. XXXI.

CONCERNING APPEALS AND REVERSALS OF DECREES IN CHANCERY, AND THE JURISDICTION OF THE LORDS HOUSE IN RELATION THEREUNTO.

I HAVE been the longer and the more particular in the diſcuſſion of the juriſdiction of the lords houſe in writs of error or bills of error, partly becauſe the learning touching it is not ſo commonly known or underſtood; and partly, becauſe it makes way to the better diſcovery of the lords juriſdiction in point of decrees in courts of equity, and their examination by way of appeal or petition of reverſal, which hath cauſed ſo great and warm conteſts between the two houſes of parliament.

TOUCHING the juriſdiction of the court of chancery in cauſes of equity, certainly it was not very ancient, as I have before ſhewn *; wherein I have alſo ſhewn the degrees and methods whereby it hath attained *de facto* that ample juriſdiction in cauſes of equity, that now it hath in effect ſwallowed up the courts of law, and indeed in a great meaſure altered and in effect abrogated the common law.

BUT this court hath now ſo long been in the poſſeſſion of this equitable juriſdiction, and the eſtates contracts and aſſurances of lands and perſons are ſo much intereſted in that juriſdiction, that it is not only a vain thing for any one perſon to contend againſt it, but a ſudden alteration therein may be of very ill conſequence to the public. Neither is ſuch alteration or abridgment of the power of the chancery to be attempted without authority of parliament; and that alſo with great and deep deliberation, and with a convenient time given before ſuch alteration made, that men may accordingly

* See before, CHAP. VI.—F. H.

order

order their contracts ſettlements and dealings with a due proſpect to ſuch alteration.

But yet the late arrival of the court of chancery to this exerciſe of juriſdiction muſt needs have this effect, that we are not like to find in ancient records and monuments frequent precedents, that may direct our inquiry touching this matter of appeals. But the beſt meaſures we can take herein will be,—I. To examine the matter by reaſon.—II. To examine it by the analogy, that it holds or may have with writs of error and reformation of judgments in the courts of common law by the lords in parliament.—III. To conſider of what antiquity ſuch reverſals are in the lords houſe of decrees in chancery, and how made.—IV. To conſider ſome things *de bono*, what is fit to be done, as well as *de vero*, what may be done, eſpecially where there is difficulty in the matter of fact.

Preliminary to this argument we are firſt to conſider thoſe methods for the rectifying of erroneous decrees in courts of equity, which are not relative to parliament, and touching which there is no colour of controverſy. And the methods are three.

1. By a *rehearing* of the cauſe by the chancellor himſelf, which he may do, and if he ſee cauſe may alter his decree. But this muſt be before the decree be enrolled of record; for when it is ſigned and enrolled by the ſtile of that court it cannot be reheard.

2. By *bill of review* in the ſame court. And this is after the decree ſigned and enrolled. But this is ſomewhat a ſtrait-laced remedy. For they neither examine, nor read the proofs in the cauſe, whether they warrant the decree; neither is this bill of review allowed, unleſs the decree be performed, if it concern payment of money. But all the matters, that maintain ſuch a bill of review, muſt be ſome error appearing in the body of the decree or in the proceed-

ings of record, or ſome matter *ex poſt facto*, which hath happened ſince the cauſe or come newly to be diſcovered, which, had it been known and alledged and due proof thereof made upon the hearing, would probably have ſuſpended or altered or annulled the decree.

3. By *appeal to the king*, by petition, ſetting forth the matter of the decree, the unwarrantableneſs of the decree by the proofs in the caſe, the untruth of the ſuggeſtions on the decree, and thereupon praying a rehearing of the cauſe either before the king himſelf or ſuch commiſſioners as he ſhall aſſign by commiſſion under the great ſeal to hear examine and determine the cauſe. And thereupon the king uſually iſſues his commiſſion under the great ſeal to ſome of his privy council and to ſome of the judges for this purpoſe, before whom the cauſe is to be heard *de novo* from the beginning, and to be affirmed or reverſed as there is cauſe. And ſuch commiſſions as theſe have ſometimes iſſued; and the reaſon, why they have not iſſued oftener, is in reſpect of the great charge and delay in ſuch commiſſion, and the uncertainty of the ſucceſs becauſe of the great uncertainty and arbitrarineſs uſed in equitable proceedings. But that this is the regular and legal way of appealing from and reverſal of decrees in chancery, we have not only the judgment of the lords themſelves in the parliament of 21. *Jac.* in Mathew's caſe hereafter mentioned, but the reſolution of all the judges, long before this queſtion ſtarted, *Hill.* 13. *Jam. Roll's Rep.* 331. and *Bulſtr.** in the caſe between Vawdry and Pannel, and *Mich.* 42. & 43. *Eliz.* in the caſe of the counteſs of Southampton againſt the earl of Worceſter certified by the judges under all their hands.

And whether the petition of appeal be made to the king in ſuch caſe in parliament or out of parliament, ſuch a commiſſion may be thereupon iſſued; for it is the king's commiſſion, that gives the juriſdiction in this caſe.

* *J. Ro. Rep.* 331. 3. *Bulſt.* 116.——F. H.

Again,

AGAIN, in parliament, if a parliamentary petition of appeal be delivered to the king and anſwered by him or by his direction, the anſwer is of itſelf a commiſſion according to the tenor of the endorſement, and gives as full a power to thoſe to whom the hearing and determining of the complaint is referred, as if it were a commiſſion under the great ſeal; and though this latter be more regular and formal, yet they are both equally effectual. And therefore if the petition be indorſed, *ſoit cette matiere oyée et terminée par les ſeigneurs ſpirituall et temporall, en parlement*, or *par les juges*, or by a ſelect number of lords and judges, or by the *auditores querelarum*, it gives them a full commiſſion for the determining thereof, as if it were by commiſſion under the great ſeal: for the petition and the king's anſwer indorſed are a record; and by what before is ſhewed touching writs of error, a petition of error thus indorſed is as full a commiſſion to the lords in parliament to examine and reverſe or affirm a judgment at law, as if it had been done by writ, for in thoſe caſes the king's anſwer is an effectual commiſſion according to the tenor of it.

AND therefore if in parliament there be a petition of appeal againſt a decree in chancery, and the king indorſes the petition, *ſoit mande as ſeigneurs ſpirituall et temporall*, or to a ſelect number thereof, *a oyer et terminer ceſt appeale*, there is no queſtion to be made, as I conceive, but that according to the tenor of endorſement there may be a proceeding in parliament to hear and determine *ex integro* the juſtice or injuſtice of ſuch decree; for the king, that is the fountain of juriſdiction, hath hereby delegated the ſame by ſuch his endorſement of the petition as effectually as if it were done by commiſſion under the great ſeal.

THE true ſtate therefore of this queſtion is, whether the houſe of lords, by a kind of innate inherent juriſdiction, have power, without any ſuch commiſſion or delegation from the king, to receive appeals againſt decrees in chancery, and to hear and determine them upon a plenary hearing of the cauſe; or not.

And I ſhall not intangle the queſtion with this; whether they may immediately before a bill of review in the court below proceed to the hearing and determining of ſuch appeals. For therein I think this difference will obtain. If the cauſe of appeal be ſuch a matter, as the party petitioning may have remedy by bill of review in the court below, then I think he ought not *per ſaltum* to come to the lords before ſuch bill of review had and finally determined; for it is a proceeding *per ſaltum*, and extraordinary remedies are not to be uſed till the ordinary remedies fail; as in the caſe of the biſhop of Norwich, *rot. parl.* 50. *E.* 3. *n.* . where it was reſolved, that a writ of error lies not in parliament upon a judgment given in the common pleas, till the ſame is affirmed or reverſed in the king's bench. And thus I have known it often reſolved in the lords houſe in parliament, where petitions of appeal againſt decrees in chancery have been diſmiſſed, if they contain only matter of review remediable below, and no bill of review either purſued or finally determined in the chancery.

But the queſtion in controverſy is touching ſuch appeals, as require an entire rehearing of the cauſe upon the proofs had therein; which cannot be done by bill of review, but muſt be done in another way. This is that, which is the true matter and ſtate of the queſtion.

CHAP.

CHAP. XXXII.

THE REASONS AS WELL FOR, AS AGAINST, THE JURISDICTION OF THE LORDS HOUSE AS SUCH IN CASES OF APPEALS FROM DECREES IN EQUITY.

THE reaſon aſſerting this juriſdiction inherent and radical in the lords houſe are as follow:

1. IT ſeems a thing highly unreaſonable, that the decree of a chancellor, who may err as well as another man, ſhould be ſo concluſive, that the ſame ſhould be unexaminable by any other court, but be binding as the laws of the Medes and Perſians, or as an act of parliament.

2. THE court of parliament, as ſitting in the lords houſe, or the lords ſpiritual and temporal aſſembled in parliament, are the higheſt court of juſtice in the realm: and here the judgments at law of the greateſt ordinary court of juſtice, namely the king's bench, are examinable and reverſible for error. And what reaſon can there be, that a decree in a court of equity ſhould have a greater ſacredneſs than a judgment at law?

3. THERE are ſeveral precedents in the lords houſe of reverſals of decrees in courts of equity and ſentences in the court of ſtar-chamber, upon petitions immediately preferred to the houſe of lords, without any commiſſion or indorſement of a petition by the king; eſpecially in the long parliament begun in 1640. And now muſt all thoſe reverſals fall to the ground, upon ſuppoſition that the lords had no juriſdiction in the caſes? Nay, there are ſome inſtances of ſuch reverſals in the parliament of 3. *Car.* 1. and poſſibly upon further

further ſearch there may be more precedents found much more ancient.

On the other ſide, there are reaſons of great weight againſt an original inherent juriſdiction in the houſe of lords, without a ſpecial commiſſion or delegation of ſuch authority from the king, either by commiſſion under the great ſeal, or by endorſement of ſuch petition or bill of reverſal firſt made to the king.

1. Although that the Engliſh monarchy is not in all reſpects abſolute and unlimited, but hath certain qualification of monarchical power, eſpecially in point of making laws and impoſing taxes upon the people; yet certainly, ſince the denomination of government is *ad plurimum*, the government is monarchical, and not ariſtocratical or democratical. And hence it is, that all juriſdiction in this realm, whether eccleſiaſtical or civil, is derived from the crown; and that the exerciſe thereof in the miniſters or judges, to whom it is ſo delegated by the crown, is in right of the crown and by virtue of a delegation from it. And it were a thing ſcarce conſiſtent with the monarchical government, that thoſe ſentences judgments or decrees, which are pronounced and given by the king's authority and commiſſion, ſhould be examined by an original juriſdiction lodged in the houſe of lords without eſpecial authority given by the king by writ commiſſion or endorſement. This were to make the baſis of the government ariſtocratical; ſince the laſt divolution of appeals would be, from the king and the judgments given by his authority, unto the lords.

2. I have at large ſhewed, in the * Chapter, that the review or reverſal of judgments given in the king's courts is *inter caſus reſervatos*, and cannot be put in ure *ſine ſpeciali mandato*. And therefore judgments given in the loweſt courts cannot be reformed without a writ of falſe judgment, and judgments in the king's courts

* See before, Chap. XXIII. p. 153.——F. H.

are

are not to be examined in the lords houſe without a petition to the king and a bill ſigned or writ of error under the great ſeal. And the ſame reaſon holds in decrees in chancery; for (as by uſe and long cuſtom the ſame has been practiſed and ſettled) thoſe decrees are made by the chancellor by the king's authority, and in his right, and as the ordinary judge in cauſes of equity thereunto deputed by the king, and therefore not to be examined or ſhaken without the king's conſent. For it were an effort to ſet a ſuperintendency of the juriſdiction of the lords houſe above the juriſdiction of the crown in caſes of appeal: for it carries over the dernier reſort in caſes of this nature ſingly to the houſe of lords.

3. SINCE there can be no juriſdiction in this kingdom, but what is by charter, or by commiſſion from the king, or by uſage or preſcription, which always implies a tacit derivation; and ſince there is nothing of ſuch juriſdiction given expreſly to the lords, for the writ whereby they are ſummoned is *ad tractandum nobiſcum ſuper arduis negotiis regni*; it remains, that they, that will aſſert this juriſdiction in the lords houſe in caſes of appeals without any particular commiſſion or authority by bill ſigned, muſt make it out by proofs of record of unqueſtionable authority and good antiquity; which can never be done; but the contrary thereof will appear, when we come to anſwer the reaſons aſſerting this juriſdiction.

Now as to the reaſons of the affirming aſſertion.

1. As to the firſt, it is certainly moſt juſt and reaſonable, that there ſhould be by law appointed ſome means for examining and reforming errors in decrees. The law itſelf and the government were lame and defective without it. This therefore is not the queſtion. But the queſtion is, whether the houſe of lords have a radical and inherent power to do it without a ſpecial commiſſion from the king; for of all hands it is agreed it may be done by ſpecial

cial commiſſion either under the great ſeal or by the king's endorſement of a parliamentary petition to that purpoſe.

2. And the ſame anſwer is to the ſecond reaſon. Though the court of parliament of the lords houſe were the higheſt ordinary court; yet that doth not therefore enable them to reverſe judgments or decrees without a ſpecial commiſſion by letters patent bill ſigned or writ of the king enabling them thereunto. The king's bench out of parliament is the higheſt court of ordinary juſtice; yet they cannot reverſe judgments in inferior courts without a writ of error under the great ſeal.

But by the way, though the court of the lords houſe in parliament be higher than other courts, yet we muſt not take it to be the ſupreme court; for ſuch only is the ſupreme court of parliament, conſiſting of the king as the head and the two houſes of parliament, conſtituting all together a ſovereign court *.

* The precedents, which make the third reaſon for the houſe of lords, are the ſubject of the next Chapter. — F. H.

CHAP.

CHAP. XXXIII.

CONCERNING THE PRECEDENTS OF THE EXERCISE OF JURISDICTION IN THE LORDS HOUSE, IN REVERSALS OF DECREES IN CHANCERY IN CAUSES OF EQUITY.

IF the lords could give us good evidence of record, of their ancient and common practice of reverſal of decrees in chancery by an inherent original juriſdiction reſiding in that houſe without commiſſion or delegation from the king, it would be of great moment for the aſſerting of their juriſdiction in this particular.

BUT upon a ſtrict ſearch and inquiry, we ſhall find a great defect in the proof of the fact.

IT is true, there hath been ſince 1. *Car.* 1. ſome inſtances, and ſince 16. *Car.* 1. many more in the long parliament, of ſuch reverſals of decrees. And this practice had its riſe upon theſe three* occaſions.

1. THE lord Verulam being chancellor made many decrees upon moſt groſs bribery and corruption, for which he was deeply cenſured in the parliament of 18. *Jac.* And this gave ſuch a diſcredit and brand to the decrees thus obtained, that they were eaſily ſet aſide, and made way in the parliament of 3. *Car.* for the like attempts againſt decrees made by other chancellors.

2. MR. SELDEN, being a man of great learning, was employed by the lords in parliament 18. *Jac.* to collect the privileges of the

* In the original it is two. But what follows apparently requires, that *three* ſhould be ſubſtituted.——F. H.

lords; which was done and preſented to the lords, and by them ordered to be bound up and preſerved as a kind of ſtanding evidence of their juriſdiction and privileges; as appears by the Journal of that parliament, viz. 30. Novemb. 1621. and 15. Dec. 1621. which book is ſtill reſerved among their archives and is printed. And this book gave the lords occaſion of looking into the *Placita Parliamenti tempore E.* 1. which they applied ſingly to the houſe of lords; and thereupon began in the parliament following, viz. 21. *Jac.* to enlarge their juriſdiction, not only to cauſes of appeals, but almoſt to all kind of juriſdiction in the firſt inſtance: ſo that there was little wanting, but that they had gotten it to be a ſettled court by petition to themſelves in all cauſes as well civil as criminal. But this held not long.

3. AGAIN, when the long parliament came after intermiſſion of parliaments, and the grievances of the ſubjects by the reaſon thereof were very many and importunate, ſuch a throng of complainants preſſed into parliament, eſpecially into the lords houſe, as tranſported proceedings in that houſe beyond the known ancient and regular bounds thereof. Complaints of decrees ſentences and judgments came in apace, and were promiſcuouſly heard. And indeed it would be too hard a taſk for any perſon to juſtify all proceedings of that time to be conſonant to the ancient and regular proceedings of parliament.

THESE then were the reaſons that let the lords into this exerciſe of juriſdiction of appeals, as ſuppoſed to be radically inherent in the houſe. And I could never yet ſee any precedent of greater antiquity than 3. *Car.* 1. nay ſcarce before 16. *Car.* 1. of any ſuch proceeding in the lords houſe.

BUT I ſhall now ſhew, what was the firſt attempt of ſetting up this juriſdiction in the lords houſe, and what ſucceſs it had.

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BEFORE the parliament of 18. *Jac.* wherein the lord chancellor Bacon was cenſured for corruption, the courſe for reverſal of decrees was,—either by petition to the king, and thereupon a commiſſion iſſued to examine the decree and proceedings, whereof there are ſome precedents;—or elſe to ſet it aſide by act of parliament; and ſuch was the proceeding of 26. *Maii* 21. *Jac.* for reverſing a decree for the felt-makers and ſome others about that time.

BUT, even in theſe latter parliaments in king James's time, the reverſal of decrees by the inherent power of the lords houſe was either not known, or ſo new that it was ſcarce adventured upon by the lords.

IN the parliament of 18. *Jac.* viz. Journal of 3. Dec. 1621. ſir John Bourchier petitioned the lords againſt a decree by the then lord keeper in nature of an appeal, becauſe his witneſſes were not read; and prayed the lords, that they would rehear the cauſe upon the proofs. The lords referred the buſineſs to a committee to examine and report what had been done in like caſes.—10th December the lords referees report, that they could find but one of that nature againſt Michael de Pole lord chancellor, and that upon bribery and corruption. The lords thereupon examined parties, whether the proofs were refuſed to be read in ſir John Bourchier's caſe; and finding upon examination, that all material proofs that were deſired by ſir John were read, they cauſed ſir John Bourchier for the ſcandal put upon the keeper to aſk his pardon; but would never proceed to rehear the cauſe upon the merits thereof, as deſired by the petition.

IN the parliament of 21. *Jac.* the caſe of Mathews, as it is reported by the Journal of the lords houſe, is very ſignal, and expreſly againſt this radical inherent juriſdiction in the lords houſe.

8. MAY 1624. William Mathew preferred a petition to the lords in parliament againſt a decree made in chancery for his brother George Mathew in diſcharge of a debt of 5260l.—After ſeveral hearings by the lords committees for petitions, the lords committees 28. May 1624. report their opinion to the houſe; which was in effect to reverſe the decree, and to charge the lands of George Mathew with the debt, and that the execution hereof be referred to the chancery. The ſame 28. *Maii* in the afternoon George Mathew prefers his petition to the lords, ſetting forth, that the decree had been long ſince ſubmitted to; that to hear a cauſe after a ſubmiſſion, no corruption appearing, would be a dangerous precedent; and that it had not been the courſe of this houſe to reverſe decrees by petition, but by bill legally exhibited, eſpecially no corruption appearing *. He prays, that he may have the liberty of a *ſubpœna*, and that he may not be concluded, nor a decree ſubmitted unto overthrown, nor his inheritance taken from him by this honourable houſe only upon a petition. Thereupon four lords were appointed to ſet down an order in this cauſe, viz. the earl of Montgomery, the biſhop of Lincoln, lord Say, and lord Denny.—29. *Maii* 1624. theſe lords report their order, viz. that the cauſe depending between William and George Mathew be reviewed in chancery by the lord keeper, aſſiſted by ſuch of the lords in parliament as ſhall be nominated by the houſe and by any two of the judges whom the lord keeper ſhall name; for which end the lord keeper is to be an humble ſuitor to his majeſty from the houſe, for a commiſſion unto himſelf and the lords that ſhall be named by the houſe, for the ſaid review and final determination of the cauſe, as to them ſhall appear juſt and reaſonable; and that the lords deſire may be done with all convenient ſpeed. The which order being read, the houſe approved thereof. And theſe lords were named by the houſe to be joined in

* The petition alſo ſtated, that the decree was made in the life of the petitioner George Mathew's father, and that *George Mathew himſelf was never party to the ſuit*, and that *there was not any ſuit depending*.—F. H.

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commiſſion with the lord keeper, viz. the lord chamberlain, the earl of Montgomery, the earl of Bridgewater, the lords biſhops of Durham and Rocheſter, the lords Denny and Haughton: and the houſe ordered the cauſe to be heard and determined the beginning of next term.—And note this parliament continued by ſeveral adjournments from 29. *Maii* to 2. *Novembris*, and thence till 16. *Februarii*.

Now here was the true and regular way of reviewing a decree; namely, by commiſſion. And this done, not upon a ſudden, but after ſeveral hearings and a report from the lords committees of petitions for vacating the decree. Yet after all this the lords themſelves put it into a commiſſionary way; which is an inſtance of greater weight againſt the inherent juriſdiction of the lords, than a cart-load of precedents ſince that time in affirming of their juriſdiction. And ſo much the rather, becauſe this method of reverſing of decrees in chancery holds an analogy with the reverſal of judgments in parliament, wherein the king's commiſſion, either by writ of error, or by indorſement or anſwer of a petition of error, or both, always precedes the lords proceeding to reverſe judgments for error; and holds analogy with the ſtatute of 14. *E.* 3. touching delays in judgment, wherein there is directed, that a commiſſion iſſue under the great ſeal to the lords and judges appointed for that purpoſe; and agrees with the conſtant law of this kingdom, that lodges the original of juriſdiction primitively in the crown, whence it is derived by charter commiſſion or writ to the courts of juſtice.

INDEED afterwards, in the parliament of 1. *Car.* the lords, finding that no commiſſion iſſued, blamed the lord keeper Williams for not effectual proſecuting that order. The lord keeper excuſed it; becauſe the king abſolutely refuſed to iſſue any commiſſion but by his own mandate. Yet to give a countenance to their juriſdiction, 23. *Martii* he is brought to a public acknowledgment in the lords houſe, that thoſe orders were juſt, and to aſk pardon from the houſe.

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Where yet by the way obſerve, that every affirmation impoſed by the lords is an affirmation, that the reverſal of decrees ought to be by commiſſion under the great ſeal; for that was the order of 21. *Jac.*

So that upon the whole matter, if the queſtion be *de vero* or *de jure*, there is no ſuch radical inherent juriſdiction in the houſe of lords, without a ſpecial authority derived to them, either by the king's commiſſion, or by indorſement of a petition of review or reverſal, to examine errors in decrees in the chancery.

And thus far touching the queſtion *veri* or *juris* of the lords juriſdiction in this caſe.

CHAP.

CHAP. XXXIV.

TOUCHING THE QUESTION *DE BONO*; AND WHAT EXPEDIENTS MAY BE THOUGHT OF, FOR ACCOMMODATION OF THIS DIFFERENCE, WITH A DUE SAVING OF THE KING'S RIGHT, THE INTEREST OF THE PEOPLE, AND THE HONOUR OF THE PARLIAMENT.

IT hath been ſaid, that the method of reverſal of decrees in chancery by the houſe of lords, upon the account of their own inherent radical juriſdiction and as juſtices of the laſt reſort, is moſt ſafe and convenient for the people. For what if the king will grant no ſuch commiſſion to examine an erroneous decree, ſhall the ſubject be without remedy?—Again, we know, the king by his commiſſion may name whom he pleaſe, that may be perſons unindifferent. Nay, if it ſhould be placed in the judges; yet the judges are all made by the king's commiſſion, and may be ſuch as may be at the king's pleaſure removed, and are under greater danger of being overbiaſſed. Whereas the lords are *judices nati*, fixed, perpetual: and though their honours be derived from the crown; yet being once ſo derived are hereditary in their blood, and ſo they are the leſs capable to be overborne or overpowered by other influences.

To this I ſay, that,—1. This kind of reaſoning ſeems as ſtrongly to conclude, that all juriſdiction ſhould be exerciſed by the lords. Whereas we know, that by the ſettled laws of this kingdom all the judges of Weſtminſter-hall, juſtices of gaol delivery *oyer & terminer* and peace, commiſſioners of ſewers, &c. are all conſtituted by the king; and ſo have always been; and yet the adminiſtration of juſtice in all ages performed by perſons thus commiſſionated. And to ſay the truth, it is of greateſt concernment to the crown, that ſuch com-

commiſſioners and juſtices ſhould be appointed as are both learned and juſt; for otherwiſe the damage will be of greateſt moment to the crown. And beſides, as his own intereſt and the intereſts of his ſubjects oblige him to be highly careful in ſubſtituting ſuch judges and commiſſioners as may beſt perform that employment; ſo he is under the ſolemn obligation of his coronation oath to be highly careful in this buſineſs, that juſtice be duly adminiſtered. Otherwiſe the beſt ſtrength of government will be loſt or ſhaken.—But 2. Who conſtitutes new lords, who conſtitutes the lords ſpiritual? Yet theſe have their voice in the reverſal or affirmation of judgments. And yet the ſame objection may be made againſt their ſuffrage in this caſe.—Again, 3. The ſame kind of reaſoning would give the lords an inherent radical juriſdiction, without writ bill ſigned or commiſſion, to reverſe judgments at law; which yet are not examinable by them without the king's writ, or at leaſt a petition to the king indorſed or anſwered to bring the record into parliament.

But on the other ſide, if we look upon inconveniences, we ſhall find it highly inconvenient, that there ſhould be ſuch a radical juriſdiction in the houſe of lords, eſpecially in relation to decrees in equity.

1. It is true, the lords are of a noble extraction and education; they may be experienced in politics, in military affairs. Yet no one will ſay, that *eo nomine* that they are lords they are all competent judges of caſes of law or equity. How many young lords are there, that are not thirty years old? How many are unacquainted utterly with the proceedings or rules of law or equity? Yet one of theſe may have the odd caſting voice, which ſhall overturn judgments or decrees made with greateſt deliberation of moſt learned chancellors or judges.

2. Again, as to matters of equity, they are governed in a great meaſure by circumſtances, and are not under ſuch exact rules, as the

the common law courts or cauſes are. And therefore, without a very great advertence and attention, the true equity of a cauſe is not ſo eaſily diſcerned: and therefore it is, that there daily happens great diverſity of opinions among learned men, when they come to particular caſes of equity. What kind of uncertainty ſhall we then find, when an hundred or more unexperienced men ſhall be judges of cauſes of equity? The antient rule is a certain truth. Better a miſchief in a particular caſe, than a common inconvenience. It were far better, there were no relief at all in cauſes of equity, than to have every cauſe under the various ſentiments of a hundred judges.

3. AGAIN, we daily obſerve, that in particular caſes, when they come before a multitude of judges, eſpecially that are great men and therefore not eaſily controulable, perſons concerned in ſuits meet with ſome, that are their kindred friends favourers landlords tenants or relations. And it is grown a faſhion in the lords houſe, for lords to patronize petitions: a courſe, that, if it were uſed by the judges of Weſtminſter-hall, would be looked upon, even by the parliament itſelf, as undecent, and carrying a probable imputation or temptation at leaſt to partiality. Such addreſſes as theſe are undecent and unſafe, and indeed intolerable to be found among judges, who muſt not know perſons in judgment, nor be ſweetened by ſuch kind of applications. Yet I leave it to any obſerving perſon to conſider, whether he think it poſſible, or at leaſt probable, that theſe applications can be avoided to ſo many and ſo great perſons and of ſuch extenſive relationſhip.

THESE and many more inconveniences attend this judicature at large in the lords houſe.

AND now therefore to bring this buſineſs and this book to a concluſion, I ſhall adventure to propound ſomething, that may prevent and remedy theſe and the like inconveniences; and that may preſerve

ſerve the juſt rights of the crown, the ſafety and ſecurity of the ſubject, and the honour and dignity of parliament. Which is this.

1. THAT the appointment of tryers of petitions, which is always done by the king the firſt day of a ſeſſion, may not be a piece only of name and formality, as it is now uſed; but that a ſelect number of the moſt judicious lords ſpiritual and temporal, and that not in too exceſſive a number, together with the judges, be appointed, and theſe to be commiſſionated under the great ſeal for that purpoſe, to whom as occaſion requires petitions for reverſals of decrees may be referred. And the like commiſſion for examining of judgments in writs of error. Only the judges of that court, out of which the record is removed, to be omitted in that commiſſion; and only to be preſent if occaſion require to hear the reaſons of their judgments, as in error out of the exchequer chamber before the treaſurer and chancellor.

2 THAT, according to the antient courſe, all petitions of reverſals of decrees in chancery preferred in parliament be directed to the king or the king and his council, and delivered to the receivers of petitions; and the king and his council to be attended by the receivers of petitions, and endorſements to be thereupon made according as the caſe ſhall require. *Soit cette petition bayle a tryers de petitions &c. a oyer et terminer ſolonc droit et raiſon; as eux, ou aſcuns 6 &c. d'eux, quorum &c.* And becauſe it may not be determined in that ſeſſion, then a ſpecial commiſſion to the tryers, whereof ſome of the *quorum* to examine and determine the errors in the decree; and ſo in writs of error.

THIS courſe,

1. PRESERVES the king's right as the fountain of juriſdiction: and as the decrees are paſſed by the king's authority, ſo by the ſame authority they are avoided, if there be cauſe; and not by a kind of primitive

primitive ſuperintendant inherent juriſdiction in the lords houſe; which ſome may poſſibly think ſavours too much of an ariſtocracy, giving an appeal from the king to the lords by an inherent right of a dernier reſort, which ſeems not agreeable to the conſtitution of the Engliſh government.

2. This method is moſt ſuitable to the method that the parliament hath chalked out in caſes of a like nature, as any man that attentively reads the ſtatute of 14. *Eliz. cap.* 5. for reformation of delays in judgments may eaſily obſerve.

3. This method ſuits with the antient form of reverſal of judgments in the lords houſe; which, as hath been at large ſhewn, was antiently by a ſelect number of lords thereunto appointed by the king, and no bill or writ of error in parliament without a previous petition to the king and a bill ſigned for its allowance.

4. This prevents the many miſchiefs and inconveniences, that happen upon promiſcuous determining of ſuch cauſes, by the ſupernumerary vote poſſibly of one perſon, and he poſſibly not ſo competent a judge in ſuch caſes.

5. This preſerves a handſome decorum and dignity in the lords houſe, wherein ſome of their members are always in commiſſion upon this occaſion.

6. This is the means to have ſtability and firmneſs in proceedings. Men's decrees ſhall not be broken, nor reverſed, without juſt cauſe and due examination by perſons experienced and learned in matters of this nature; for the judges here are not only to be aſſiſtants to adviſe, but commiſſioners to aſſent or diſaſſent, as they are by the ſtatute of 14. *E.* 3. *cap.* 5.

7. THIS is a proceeding regular, conſonant to law and the true intereſt of juſtice; and ſuch as even the lords themſelves, in the parliament of 2. *Jacobi*, owned as the ſafe and regular method of proceeding for reverſal of decrees in equity.

8. THIS is a great means, as on the one hand, to keep the chancellor or keeper and judges under a juſt care that their decrees and judgments be well grounded; for there is a due and regular method of appeal: ſo on the other hand is a good ſecurity provided for ſuch as have now run it may be a long and expenſive ſuit for the obtaining of a decree or judgment (and poſſibly all the ſubſtance of himſelf and his family or ſome purchaſer for valuable conſideration are laid upon it) that it ſhall not be lightly or looſely thrown off by perſons unacquainted with proceedings of this nature, and yea and poſſibly by the vote of ſuch as never heard the cauſe (if proxies be allowed, which I know not whether they are or not) or poſſibly by the vote of one that never obſerved or heard one half of the cauſe, or if he heard it yet never heard a cauſe before.

THIS method of proceeding, as well in writs of error upon judgments as in appeals from decrees, would render the proceedings of the lords much more regular and orderly, much more agreeable to the laws of the kingdom and the king's juſt right, much more ſafe for the people and conſonant to the true and antient ſtile and order of parliament, with leſs expence. And buſineſſes of this nature would receive their determination before the commiſſioners, though the parliament ſhould be prorogued adjourned or diſſolved, without forcing the complainant to begin all anew.

" FOR a concluſion of this diſcourſe, I muſt needs take notice of ſome extravagant aſſertions, that have been uſed by ſome in their aſſerting the lords juriſdiction.

THEY

THEY tell us, it is the ſupreme court; a court, from which no appeal lies; that it hath a primitive inherent juriſdiction; that it is the place or juriſdiction unto which is the laſt appeal, the dernier reſort:—which expreſſions, as they are very untrue, ſo they are very unwarily uſed by them; and I dare ſay, they either do not underſtand, or do not conſider the conſequence of them.

THE regiment of England is monarchical, and the king is the ſupreme head thereof. This is the chief article of the oath of ſupremacy.

BUT it is true, that in ſome points of ſupreme government this monarchical regiment is qualified. The king cannot make laws, nor impoſe taxes, without the advice or aſſent of both his houſes of parliament. But when laws are ſo made, yet they are the king's laws, though not to be altered or abrogated without the like conſent by which they are made.

AND the ſupreme court of this kingdom is neither the houſe of lords alone, nor the houſe of commons alone; no, nor both houſes without the king.—The high court of parliament, conſiſting of the king and both houſes, is the ſupreme and only ſupreme court of this kingdom, from which there is no appeal. Wherever the dernier reſort is, there muſt needs be the ſovereignty; and ſo this word is conſtantly uſed and joined with it.

WHEN in 36. *E.* 3. king *E.* 3. gave the principality of Aquitain to the Black Prince, they forgot to inſert or well expreſs the ſovereignty that the king intended to reſerve to himſelf, the *jus ſummi imperii*. Thereupon there was a declaration made (which you may read *Seld. Titles of Honor, page* 461 *) by the king, *que le direct ſeigniory, toute la ſouverainty, et le reſort, ſoient et demurrent a toujours*

* In the edition of 1631, it is in page 487.—F. H.

a nous

& hons it & nostre majestee. And in purſuance thereof the king made his delegates there or his judges *de ſouveraignty et du reſort*, that heard all cauſes upon appeal from the prince's juriſdiction.

THE great uſurpation of the pope upon the king's authority was, that he reſerved and practiſed the dernier reſort and appeal to himſelf: which by the ſtatutes of 24. *H.* 8. c. 12. & 28. *H.* 8. c. 10. was reſumed to the crown, and the laſt divolution of appeals to the king, and declared by that former * ſtatute that the king within this kingdom is the ſeat of juriſdiction as well eccleſiaſtical as civil, and that the dernier reſort was to be to him and not to any foreign power.

AND now let any man conſider the raſhneſs of the beforementioned aſſertion, that the dernier reſort in all caſes is radically in the houſe of lords; which certainly is one of the greateſt points of ſovereignty that can be and is coincident with it.

AGAIN, if this ſhould be, that the ſupreme juriſdiction without appeal, the dernier reſort, were to the houſe of lords, then is the legiſlative power virtually and conſequentially there alſo; or at leaſt that power lodged in the king and both houſes were inſignificant. For what if the lords will give judgment againſt an act of parliament, or declare it null and void? If they have the dernier reſort, this declaration or judgment muſt be obſerved and obeyed and ſubmitted unto irremediably; for no appeal lies from their judgment, if they be the ſupreme court. And if it be ſaid, this ſhall not be preſumed they will do: I ſay, if this poſition were true, they may if they will; and the laws of this kingdom have better provided for the preſervation both of the king's rights and the people's, than to put them and all the laws of the kingdom into the power of the lords, though otherwiſe their juſtice ſhould be unqueſtionable.

* The word *former* not in the original; but added to make the paſſage more correct.—F. H.

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THE truth is, it is utterly inconſiſtent with the very frame of a government, that the ſupreme power of making of laws ſhould be in the king with the advice of both his houſes of parliament, and judgment ſhould be in one of the houſes without the king and the other. A ſupreme power of making laws ſhould be thus in the king, and monarchical; and the ſupreme deciſive power or juriſdiction and dernier reſort ſhould be radically in the lords, and ſo ariſtocratical. Therefore it is not only *de facto* true in our government, but it is moſt neceſſary, that the ſupreme deciſive power or juriſdiction and the dernier reſort muſt be where the legiſlative power is. And it is impoſſible it ſhould be otherwiſe, unleſs we wholly diſſolve the legiſlative power of the whole body of the parliament, king lords and commons, and put it into the houſe of lords; who, by their ſupreme deciſive power without appeal, and as the dernier reſort originally radicated in them, may at their pleaſure render the legiſlative power idle vain and inſignificant.

AND by this, which has been ſaid, any man with half an eye may ſee the great inconvenience of lodging any judicatory at all in the houſe of lords ſingly, except touching their privileges; and upon what great reaſon this juriſdiction came to be diſuſed by their noble anceſtors, whoſe ſenſe of the common good of the king and kingdom, yea and of their own poſterity, did at laſt relinquiſh the exerciſe of juriſdiction ſingly for ſome hundreds of years.—And it is this.

THE high court of parliament conſiſting of the king and both the houſes of parliament are certainly the only ſupreme court of this kingdom, to whom the divolution of the laſt appeal or dernier reſort doth belong. And the lords are a conſtituent part of this ſupreme court; without which as no law can be made, ſo no final unappealable judgment can be given. Though it cannot finally and without appeal be given by them, ſo it cannot be given without them. If therefore the lords ſhould have a power of juriſdiction, an

appeal

an appeal muſt neceſſarily be to the whole parliament, king lords and commons. And yet the lords, without whom ſuch judgments cannot be repealed, ſhould, if they ſhould have or exerciſe ſuch a judicial juriſdiction, be prejudicated neceſſarily by their own judgment, and an anticipation of that determination, which (as parts of the true ſupreme power) they muſt now reverſe. And ſo the true intereſt of the ſubject to have his laſt appeal, his dernier reſort, to the true ſupreme court, the high court of parliament conſiſting of king lords and commons, is loſt, or muſt neceſſarily be fruitleſs; becauſe the lords, who as part of the parliament muſt have voice in that appeal, are already prejudicated by their own judgment and anticipated by it.

And all this inconvenience would be remedied, if, according to the antient courſe in writs of error, and according to the method propounded as well in writs of error as appeals from decrees, a certain ſelect number of the lords with the judges were commiſſionated by the king to examine hear and determine errors in judgments and decrees. For that would not engage the whole houſe; but they would be free to give their judgment upon appeals to the whole parliament.

THE END.